EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

. 85-1584-CFX
tus: GRANTED

keted:
rch 25, 1986

Title: Iowa Mutual Insurance Company, Petitioner
v.
Edward M. LaPlante, et al.

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Davis, Maxon R.

Counsel for respondent: Bottomly, Joe

try	Date	Note	Proceedings and Orders
1	Mar 25 1986	G	Petition for writ of certiorari filed.
2	Apr 24 1986		Brief of respondents Edward M. LaPlante, et ux. in opposition filed.
3	Apr 30 1986		DISTRIBUTED. May 15, 1986
4	May 16 1986		REDISTRIBUTED. May 22, 1986
5	May 27 1986		Petition GRANTED.
			**********
8	Jul 7 1986		Order extending time to file brief of petitioner on the merits until July 26, 1986.
9	Jul 10 1986		Joint appendix filed.
0	Jul 25 1986		Record filed.
1	Jul 28 1986		Certified original record and proceedings received.
2	Jul 26 1986		Brief of petitioner Iowa Mutual Ins. Co. filed.
4	Aug 14 1986		Order extending time to file brief of respondent on the merits until September 15, 1986.
5	Aug 25 1986		Brief of respondents Edward M. LaPlante, et ux. filed.
6	Sep 12 1986		CIRCULATED.
7	Sep 15 1986	X	Brief amicus curiae of United States filed.
8	Sep 15 1986		Brief amicus curiae of Blackfeet Tribe of Indians filed.
9	Sep 15 1986		Brief amicus curiae of Navajo Nation, et al. filed.
2	Sep 19 1986	D	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
1	Oct 6 1986		SET FOR ARGUMENT. Monday, December 1, 1986. (2nd case) (1 hour).
2	Oct 14 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
5	Nov 12 1986	X	Reply brief of petitioner Iowa Mutual Ins. Co. filed.
4	Dec 1 1986		ARGUED.

85-1589

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IOWA MUTUAL INSURANCE COMPANY,

a corporation,

Petitioner,

vs.

EDWARD M. LaPLANTE, VERLA LaPLANTE, ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, TERRY WELLMAN and WELLMAN RANCH COMPANY, a dissolved Montana corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MAXON R. DAVIS
CURE, BORER & DAVIS
320 First National Bank Building
P.O. Box 2103
Great Falls, Montana 59403
(406) 761-5243

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IOWA MUTUAL INSURANCE COMPANY,

a corporation,

Petitioner,

vs.

EDWARD M. LaPLANTE, VERLA LaPLANTE, ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, TERRY WELLMAN and WELLMAN RANCH COMPANY, a dissolved Montana corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MAXON R. DAVIS
CURE, BORER & DAVIS
320 First National Bank Building
P.O. Box 2103
Great Falls, Montana 59403
(406) 761-5243

QUESTION PRESENTED

Whether a federal district court has diversity jurisdiction over an action prosecuted by a citizen of one state against reservation Indians located in another state.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
STATUTES, TREATIES AND OTHER LAWS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
1. The Positions of the Eighth and Ninth Ciruits Regarding Diversity Jurisdiction Over Reservation Indians are Squarely in Conflict	6
2. This Court Needs to Further Clarify the Limits of Tribal Court Jurisdiction	6
3. The Ninth Circuit's Position has Developed From a Faulty Premise	8
4. The Ninth Circuit Position Represents an Abrogation of Federal Judicial Responsibility	10
5. The Ninth Circuit Approach Just Does Not Work	14
CONCLUSION	14
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	PAGE
American Indian Agriculture Credit vs. Fredericks, 551 F. Supp. 1020 (D. Col. 1982)	8, 9
American Indian National Bank vs. Red. Owl, 478 F. Supp. 302 (D.S.D. 1979)	8, 9
Burgess vs. Seligman, 107 U.S. 20 (1883)	13
Littell vs. Nakia, 344 F. 2d 486 (9th Cir. 1965), *cert. den.,* 382 U.S. 986 (1966)	8
Maryland Casualty Co. vs. Pacific Coal & Oil Co., 312 U.S. 70 (1941)	11, 12
Mechanical Appliance Co. vs. Castleman, 215 U.S. 437 (1910)	11
Montana vs. United States, 450 U.S. 544 (1981)	7
National Farmers Union Ins. Cos. vs. Crow Tribe of Indians, et al, 471 U.S. ———, 85 L. Ed. 2d 818 (1985)	5, 6
Oliphant vs. Suquamish Indian Tribe, 435 U.S. 191 (1978)	6
Poitra vs. Desmarrias, 502 F. 2d 23 (8th Cir. 1974), *cert. den.,* 421 U.S. 934 (1975)	5, 6, 8
R.J. Williams Co. vs. Fort Belknap Housing Authority, 719 F. 2d 979 (9th Cir. 1983), *cert. den.,* 105 S. Ct. 3476 (1985)	4,5,6, 9, 10
Sun Sales Corp. vs. Block Island, Inc., 456 F. 2d 857 (3rd Cir. 1972)	11
Williams vs. Green Bay & Western Railroad Co., 326 U.S. 549 (1946)	10
Williams vs. Lee, 358 U.S. 217 (1959)	6, 7
Woods vs. Interstate Realty, 337 U.S. 535 (1945)	8, 9

UNITED STATES CONSTITUTION:

Fourteenth Amendment 10

STATUTES, RULES AND REGULATIONS:

8 United States Code:
Sec. 1401 (a) (2) 10

28 United States Code:
Sec. 1254 (1) 2
Sec. 1331 5
Sec. 1332 ..... 2,4,5, 10, 14
Sec. 2101 (c) 2
Sec. 2201 3

RULES OF THE SUPREME COURT OF THE UNITED STATES:
Rule 20.4 2

MISCELLANEOUS:

Blackfeet Tribal Code:
Art. I, Sec. 1 ..... 7a
Art. I, Sec. 2 ..... 9a
Art. I, Sec. 3 ..... 9a

1 Moore's Federal Practice, p. 701.20 .... 12, 13, 14

1 Moore's Federal Practice, p. 701.33 12

10A Wright & Miller, Federal Practice & Procedure
Sec. 2760 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. _____

IOWA MUTUAL INSURANCE COMPANY,

a corporation,

Petitioner,

vs.

EDWARD M. LaPLANTE, VERLA LaPLANTE, ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, TERRY WELLMAN and WELLMAN RANCH COMPANY, a dissolved Montana corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Iowa Mututal Insurance Company (Iowa Mutual) hereby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the United States District Court for the District of Montana in this matter, entered on September 21, 1984, is reproduced on pages 1-2 of Petitioner's Appendix. The unpublished opinion of the United States Court of Appeals affirming the District

Court's judgment, dated September 24, 1985, is reproduced at pages 3-6 of Petitioner's Appendix. The subsequent order of the Court of Appeals, dated December 27, 1985, denying Iowa Mutual's Petition for Rehearing and suggestion for rehearing en banc appears at page 6 of Petitioner's Appendix.

JURISDICTION

The order of the Court of Appeals denying Iowa Mutual's Petition for Rehearing was entered on December 27, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1); Petitioner's application is timely pursuant to 28 U.S.C. Sec. 2101 (c), as extended by Rule 20.4 of the Rules of this Court.

STATUTES, TREATIES AND OTHER LAWS INVOLVED

The issue in the present case concerns federal diversity jurisdiction under 28 U.S.C. Sec. 1332, as the same may be affected by the jurisdiction of tribal courts, whose jurisdiction has been determined in turn as a matter of federal common law, chiefly by means of pronouncements from this Court itself.

STATEMENT OF THE CASE

Iowa Mutual Insurance Company is an Iowa corporation with its principal place of business in DeWitt, Iowa. In April, 1982, Iowa Mutual issued a package of insurance policies to the Wellman Ranch. The package included automobile and farm and ranch property and liability insurance policies. As part of the package, personal umbrella policies were also issued to Ramona Wellman, and her three sons Robert Wellman, Jr., Craig Wellman and Terry Wellman, all principals in the Wellman Ranch business. The Wellman Ranch is located within the exterior boundaries of the Blackfeet Indian Reservation, in Montana. Ramona Wellman, Robert Wellman, Jr., Craig Wellman and Terry Wellman are enrolled members of the Blackfeet Indian Tribe. The Wellmans travelled off the Reservation, to an independent insurance agent in Choteau, Montana, to apply for this insurance package.

On May 3, 1982, Edward M. LaPlante, who was then an employee of the Wellmans and in fact the son-in-law of Ramona Wellman and the brother-in-law of Robert Wellman, Jr., Craig Wellman and Terry Wellman, was injured in a single vehicle accident while driving a cattle truck in the course and scope of his employment. The accident occurred on U.S. Highway 89 within the exterior boundaries of the Blackfeet Indian Reservation. Significantly, the Wellmans did not provide Workers' Compensation insurance for their employees.

In May, 1983, Edward M. LaPlante and his wife, Verla LaPlante, filed a personal injury action against the Wellmans in Blackfeet Tribal Court. The LaPlantes, like the Wellmans, are enrolled members of the Blackfeet Tribe. Joined as Defendants with the Wellmans were Iowa Mutual Insurance Company and Midland Claims Service, a Montana adjusting firm employed by Iowa Mutual to investigate Edward LaPlante's claims. The LaPlantes sought compensatory damages from the Wellmans based upon Edward LaPlante's personal injuries and Verla LaPlante's loss of consortium. They sought compensatory and punitive damages from Iowa Mutual Insurance Company and Midland Claims Service, based upon those firms' alleged bad faith adjusting of LaPlante's personal injury claims. The Tribal Court proceedings are still pending. Both Iowa Mutual and Midland Claims Service have tried, so far unsuccessfully, to have the Tribal Court proceedings dismissed against themselves, on the basis that the Tribal Court lacks jurisdiction over them. None of the LaPlante's claims against any of the Defendants in the Tribal Court proceeding have been resolved, either by the Tribal Court, or by means of settlement between the parties themselves.

On May 22, 1984, Iowa Mutual initiated the federal litigation for which review is now sought from this Court. Iowa Mutual filed a declaratory judgment action under 28 U.S.C. Sec. 2201 against the Wellmans and LaPlantes, seeking a

determination from the Federal District Court that the LaPlante's claims against the Wellmans were excluded from the scope of coverage in any of Iowa Mutual's insurance policies issued to the Wellmans, such that Iowa Mutual was relieved of any obligation to either defend or indemnify the Wellmans for LaPlante's claims. Jurisdiction was predicated on diversity under 28 U.S.C. Sec. 1332. Iowa Mutual is an Iowa corporation; the Wellmans and LaPlantes are all Montana citizens.

While both the Wellmans and LaPlantes appeared in the declaratory judgment proceeding, the LaPlantes specifically moved to dismiss the case, on the basis of a Ninth Circuit Court of Appeals existing precedent, R.J. Williams Company vs. Fort Belknap Housing Authority, 719 F. 2d 979 (9th Cir. 1983), *cert. den.*, 105 S. Ct. 3476 (1985). In *R.J. Williams*, the Ninth Circuit determined that no federal diversity jurisdiction would exist for a claim against a reservation Indian, if the courts of the state in which the reservation was located would not have jurisdiction. A non-Indian litigant would first be required to apply to the tribal court to determine whether that tribunal felt itself possessed with jurisdiction. If it did, there would apparently be no state court jurisdiction, and therefore no federal diversity jurisdiction. The District Court granted LaPlantes' motion.

Iowa Mutual appealed to the Ninth Circuit. In an unpublished September 24, 1985 opinion, a three judge panel affirmed the District Court's dismissal of Iowa Mutual's declaratory judgment proceeding. The circuit panel reaffirmed the validity of *R.J. Williams* on the diversity issue. According to the Court of Appeals, *R.J. Williams* stands for the proposition that the federal courts are "'divested of diversity jurisdiction whenever the dispute [involves] the exercise of the tribe's responsibility for self-government' but that jurisdiction is not divested 'when the tribe has not itself manifested an interest in adjudicating the dispute.'" (See Appendix, page 5a.) In the latter situation, the Court of Appeals contemplated the parties first obtaining a determination from the Tribal Court as to whether it would "assume" jurisdiction. The Court of Appeals left unanswered how any litigant such as Iowa Mutual, which has felt from the outset that the Tribal Court lacks jurisdiction over it and wants to avoid the tribal judicial system, is supposed to obtain such a determination from the Tribal Court.

Interestingly, the Court of Appeals felt that its reaffirmation of the *R.J. Williams'* doctrine was consistent with this Court's own very recent Indian jurisdiction decision, National Farmers Union Insurance Cos. vs. Crow Tribe of Indians, et al, 471 U.S. _____ , 85 L. Ed. 2d 818 (1985), even though the latter was a federal question case under 28 U.S.C. Sec. 1331. More particularly, *National Farmers* was a federal common law question case which has to be viewed, at least implicity, as permitting a greater expression of subjective judicial policy, simply in terms of defining the federal question itself. Conversely, the prerequisites for federal diversity jurisdiction under 28 U.S.C. Sec. 1332 (citizenship of the parties and amount in controversy) have to be viewed (regardless of the extensive litigation which they have spawned) as more objective.

More as a procedural matter, the Circuit Panel also noted that it was constrained by its own internal rules not to question the continuing validity of the *R.J. Williams* decision as the "controlling authority" in the Circuit. On that basis, Iowa Mutual sought a rehearing and suggested that the matter be reheard en banc by the entire Ninth Circuit. In making that request, Iowa Mutual noted not only the unanswered procedural questions which the Ninth Circuit's position raised, but also the fact that the *R.J. Williams* doctrine put the Ninth Circuit's position in conflict with that of the Eighth Circuit Court of Appeals, as expressed in Poitra vs. Desmarrias, 502 F. 2d 23 (1974), *cert. den.*, 421 U.S. 934 (1975). The Ninth Circuit declined Iowa Mutual's invitation to reexamine *R.J. Williams;* its petition for rehearing was denied on December 27, 1985.

REASONS FOR GRANTING THE WRIT

1. THE POSITIONS OF THE EIGHTH AND NINTH CIRCUITS REGARDING DIVERSITY JURISDICTION OVER RESERVATION INDIANS ARE SQUARELY IN CONFLICT.

As noted above, the Eighth Circuit Court of Appeals determined back in 1974 that federal diversity jurisdiction could be maintained in a lawsuit against a reservation Indian, even though the Courts of the state in which the federal tribunal sat would be precluded from hearing the case. Poitra vs. Desmarrias, *supra*. As Justice White noted in his dissent to the refusal to grant certiorari in *Poitra*, a clear conflict existed between the Eighth and Ninth Circuits then. *Id.*, 421 U.S. 934.

As *R.J. Williams* and this currently pending matter demonstrate, the conflict remains. This Court should resolve it now. This case presents an ideal opportunity, since it is uncomplicated by extraneous issues.

2. THIS COURT NEEDS TO FURTHER CLARIFY THE LIMITS OF TRIBAL COURT JURISDICTION

For the past 25 years, since Williams vs. Lee, 358 U.S. 217 (1959), this Court has itself devoted what many may view as a disproportionate amount of its limited resources to Indian law matters. The trend appears to have accelerated in recent years, rather than abate. Cf. National Farmers Union Ins. Cos. vs. Crow Tribe of Indians, et al., *supra*. A large measure of the problem can no doubt be traced to the development and strengthening of tribal institutions, such as tribal courts, coupled with an increase in relations, commercial and otherwise between reservation Indians and outsiders. See Oliphant vs. Suquamish Indian Tribe, 435 U.S. 191, 211-212 (1978). Increased litigation was inevitable.

While the relationship between reservation Indians and outsiders has traditionally been viewed as based upon statutes and treaties with the tribes themselves, the simple

fact remains that those treaties were negotiated at a time when the tribes were to a great extent aboriginal in makeup, and largely uninfluenced by European or "American" values. The legal framework within which the relationship between those Indian tribes and outsiders developed simply did not contemplate late twentieth century realities of sophisticated commercial and social relationships between reservation Indians and outsiders, nor the fact that many reservation Indians have either adopted or at least been influenced by the institutions and values of the larger non-Indian society within which they are located. Cf., Montana vs. United States, 450 U.S. 544 (1981). Congress has not acted to any great extent on the subject; it has been left to the federal judiciary, and particulary this Court, to develop a twentieth century legal framework.

It is an important task. While reservation Indians may be small in number, their reservations occupy vast tracts of lands, particularly in the western United States. It is naive to believe that the Indians who live on these reservations will occupy themselves in the manner contemplated when those reservations were established over 100 years ago — that is, maintaining an aboriginal life style, isolated from the rest of American society. Commercial and social interaction between reservation Indians and outsiders has increased. That increase can probably be rightly viewed as an inevitable outgrowth of the strengthening of tribal institutions, which will probably permit an increase in the type and sophistication of the dealings between reservation Indians and outsiders. This case is a good example. It does **not** involve fishing rights on streams flowing through reservation land (Montana vs. United States, *supra*) or a grocery bill incurred at a reservation "trading post" (Williams vs. Lee, *supra*). Rather, it involves tribal members who organized a ranch business and then travelled off the reservation to purchase a package of insurance policies written by an out-of-state insurance company.

To the extent underlying treaties and statutes permit, a recognizable framework ought to be developed for the reso-

lution of disputes arising from commercial and social relationships between reservation Indians and outsiders. Such an approach has to be viewed as beneficial to all concerned. Resolution of uncertainties would no doubt strengthen tribal institutions, since both tribal members and those who deal with them from the outside would be able to act with the confidence that comes from knowing the full extent of the authority of the tribal institutions.

Insofar as diversity jurisdiction is concerned, we appear to be moving in the opposite direction. Considerable uncertainty exists, particularly in the Ninth Circuit, as to what manner of disputes can be adjudicated in a federal court, and which are within the exclusive domain of tribal courts. The situation can be contrasted with the present state of affairs in the Eighth Circuit, where both reservation Indians and outsiders know that if federal diversity jurisdiction exists, their disputes can be resolved in a federal forum. Poitra vs. Desmarrias, *supra;* American Indian National Bank vs. Red Owl, 478 F.Supp. 302 (D.S.D. 1979). The same situation apparently obtains in the Tenth Circuit as well. See American Indian Agriculture Credit vs. Fredericks, 551 F.Supp. 1020 (D. Col. 1982). As Justice White recognized back in 1975, the situation calls for resolution by the Supreme Court. If anything, that need has increased in the subsequent 11 years.

3. THE NINTH CIRCUIT'S POSITION HAS DEVELOPED FROM A FAULTY PREMISE

According to the Ninth Circuit, its idea, that a federal district court cannot entertain, as a diversity action, a lawsuit against a reservation Indian which could not be heard in state court, developed from Woods vs. Interstate Realty, 337 U.S. 535 (1945). See Littell vs. Nakia, 344 F.2d 486 (9th Cir. 1965), *cert. den.*, 382 U.S. 986 (1966).

In *Woods*, this Court decided that a foreign corporation disqualified under Mississippi law from maintaining a lawsuit in Mississippi state courts could not maintain the same lawsuit as a diversity action in federal court. We have no

quarrel with *Woods*. There is a fundamental fairness about the result. A party should not be able to benefit by its evasion of state law, by having a federal forum nonetheless available to it. However, the critical feature of *Woods* was that it was a *state* law that prevented the party from utilizing that state's judicial system.

Woods should not properly be viewed as applying to an out-of-state litigant maintaining a federal diversity action against an in-state reservation Indian. Those state courts which cannot hear cases against reservation Indians have not been precluded from doing so by any state law, but rather be federal law. See Poitra vs. Desmarrias, *supra*; American Indian Agricultural Credit vs. Fredericks, *supra*; American Indian National Bank vs. Red Owl, *supra*. In *American Indian Agricultural Credit*,the Court aptly summarized the correct view:

> "The *Poitra* Court asserted that Indians enjoy their special immunity from state law only as a result of federal law. Therefore, federal jurisdiction would not impinge on state jurisdiction in contravention of *Erie*, where the state itself has not created an additional immunity for Indians on independent State policy grounds: 'The reason that (a state) lacks jurisdiction over this civil action is because of the special status given Indians by federal law, not because of any *state* policy consideration.' " *Id.* at pages 1021-1022.

As the Ninth Circuit itself took pains to note in *R.J. Williams*, the State of Montana has not declined on its own to adjudicate controversies involving Indians. R.J. Williams vs. Fort Belknap Housing Authority, *supra*, at p. 984. Federal law, much of it enunciated by either the Ninth Circuit or this very Court, has served to close the Montana state court system to actions against reservation Indians. Such federal action should not be viewed as having also closed the federal courthouse doors, based on the *Woods* case.

4. THE NINTH CIRCUIT'S POSITION REPRESENTS AN ABROGATION OF FEDERAL JUDICIAL RESPONSIBILITY

There is no question here that, apart from the LaPlantes and Wellmans' status as reservation Indians, diversity jurisdiction exists. The amount in controversy is well in excess of the $10,000.00 minimum, given simply the fact that LaPlantes' prayer for punitive damages against Iowa Mutual in the tribal court proceeding is for $5,000,000.00. The allegation that Iowa Mutual is a citizen of Iowa is uncontradicted. By federal law, the LaPlantes and Wellmans, as Indians, are also United States citizens. 8 U.S.C., Sec. 1401 (a) (2). As citizens they come within the scope of the 14th Amendment to the United States Constitution:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States *and of the State wherein they reside.*" (Emphasis added.)

Since the Blackfeet Indian Reservation is located in Montana, the LaPlantes and Wellmans are citizens of Montana.

All of the requisites which Congress has imposed in 28 U.S.C. Sec. 1332 are present. Conversely, Congress has engrafted no exception on to the diversity statute upon which the Ninth Circuit relies in declining to allow the exercise of that jurisdiction. The Ninth Circuit's "reservation Indian" exception to 28 U.S.C. Sec. 1332 appears to be an entirely judicial creation. We know of no authorization for such a judicial departure from Congress' clear expression of authorization for diversity actions. Cf., Williams vs. Green Bay and Western Railroad Co., 326 U.S. 549, 553-554 (1946).

The Ninth Circuit requires, according to *R.J. Williams*, that federal diversity jurisdiction depend upon a tribal court first determining whether it possesses jurisdiction over the matter. By deferring in such a fashion to a tribal court, the federal judiciary would be abrogating its responsibility to determine its own jurisdiction.

> "The diversity jurisdiction of Federal Court is even more a matter of significant federal interest because it is based on the grant of power contained in Article III, Sec. 2, of the Constitution. Its breadth must be determined at federal and not state level, and it is appropriate to bow to the state limitations only when they advance some proper state policy." Sun Sales Corp. vs. Block Island, Inc., 456 F 2d 857, 860 (3rd Cir. 1972)."

See also Mechanical Appliance Co. vs. Castleman, 215 U.S. 437, 443 (1910).

Such considerations have to be viewed as applying with equal force to tribal courts, no less than state courts. If federal diversity jurisdiction exists, it exists regardless of whether a tribal court or any other tribunal says it does or not. Federal diversity jurisdiction is a creature of federal law, to be construed under federal principles by federal courts. To the extent that the federal judiciary must defer to a tribal court to allow the latter to determine whether it should exclusively adjudicate a controversy means that the federal judiciary is abrogating its responsibilities.

In stating as much, Iowa Mutual is not suggesting that the federal judiciary usurp legitimate tribal court authority. We are simply suggesting that there are a range of disputes between tribal members and outsiders which can be adjudicated in a federal forum, if the requisites for federal jurisdiction are otherwise met. One is simply hardpressed to say that a dispute over the coverage of insurance policies issued by an insurance company that the Blackfeet Tribe has never sought to regulate in any fashion whatsoever so implicates tribal self government that a federal court must refrain from exercising its jurisdiction, Montana vs. United States, *supra*. In that regard, it cannot be overlooked that federal declaratory judgment actions have been repeatedly

viewed as appropriate devices for resolving insurance coverage disputes. See Maryland Casualty Co. vs. Pacific Coal and Oil Co., 312 U.S. 70 (1941); see also 10 A Wright and Miller, Federal Practice and Procedure, Sec. 2760.

Admittedly, diversity jurisdiction was — and remains — controversial. Its opponents have repeatedly cited its abolition as a remedy for clearing the overburdened dockets of federal courts. Yet the fact remains that Congress has refused to abolish it and we submit that its existence remains justified today, no less so than two centuries ago. As Professor Moore has noted:

> "Citizens of different states are also citizens of the United States and they ought to be able to litigate their controversies in the tribunal of the sovereign to which they both belong. This need is especially apparent when the parties are engaged in interstate transactions and when problems of conflicts of law are involved. There is little doubt that the development of commerce has been aided by the existence of diversity jurisdiction, and, consequently, its abolition, especially in regard to corporate usage, is not justified by experience." 1 Moore's Federal Practice, page 701.33.

As Iowa Mutual suggested above, the "development of commerce" with reservation Indians would be aided in just the same fashion as the development of commerce between citizens of different states was aided through the existence of diversity jurisdiction.

Moreover, Iowa Mutual is not at all ashamed to admit that the same concerns which have historically been viewed as being the genesis of diversity jurisdiction have prompted it to seek a federal forum for resolution of this insurance coverage dispute.

> "It is the generally accepted view that diversity jurisdiction was established to provide access to a competent and impartial tribunal, free

> from local prejudice or influence, for the determination of controversies between citizens of different states." 1 Moore's Federal Practice, page 701.20

See also Burgess vs. Seligman, 107 U.S. 20, 34 (1883).

Iowa Mutual has a very real fear of local prejudice, if it has to litigate the extent of any coverage it has to provide to individual Blackfeet Indians in a proceeding in their Tribal Court. Iowa Mutual Insurance Company is not a member of the Blackfeet Tribe; the individual Defendants apparently all are. According to Article I, Sec. 2 of the Blackfeet Tribal Code, all of the judges of the Court must also be members of the Blackfeet Tribe. (See Appendix, page 9). Furthermore, according to that same section of the code, the additional qualifications for being a Tribal Judge are extremely limited. One must have a high school education, be over 21 years of age and not be a convicted felon. More troubling, under Sec. 3 of Article I of the Tribal Code, judges serve at the pleasure of the Tribal Council. (See Appendix, page 9). It would appear that the Blackfeet Tribal Court system is particularly susceptible to local political influence. As an outsider, Iowa Mutual is not comfortable with that situation.

Proponents of the Ninth Circuit position may perhaps argue that allowance of federal diversity jurisdiction in actions involving reservation Indian defendants would not strengthen tribal institutions but rather weaken them. Such an argument has no merit. As a first point, insofar as diversity jurisdiction is concerned, no empirical data exist to support that point of view. Secondly, the same argument could have been made about the effect of federal diversity jurisdiction on state court systems. Once again, there is no evidence to suggest that this view has any merit. The existence of federal diversity jurisdiction has not had any adverse effect on state judicial systems. There is no reason to believe that it would have any adverse effect on tribal judicial systems either. Furthermore, the effect on any judicial system (be that effect positive, negative or neutral, and be

that system federal, state or tribal) is not the rationale behind federal diversity jurisdiction. Diversity jurisdiction was created for the sake of the parties themselves. See Moore, *supra*. Federal diversity jurisdiction was created to provide a neutral forum for resolution of controversies among citizens of the different states. A judicially created exception should not be sanctioned at the expense of any class of litigants.

5. THE NINTH CIRCUIT APPROACH JUST DOES NOT WORK

The Ninth Circuit feels that a tribal court should first decide whether it can hear a matter before a federal court should be permitted to determine the extent of its own diversity jurisdiction. Litigants such as Iowa Mutual have been told to file their diversity actions in tribal court, so that that court can first determine whether it has jurisdiction over the matter. Yet, Iowa Mutual filed a diversity action in federal court precisely for the reason that it wanted to avoid litigating in tribal court.

Quite obviously, the Indian defendants are not going to challenge the tribal court's jurisdiction. By filing its own declaratory judgment in tribal court, Iowa Mutual will have, in effect, voluntarily consented to the tribal court's jurisdiction over it. How can a plaintiff challenge the jurisdiction of a court in which it voluntarily files an action? We do not know. Thus, the Ninth Circuit has established a fundamentally impossible and impractical solution to the diversity jurisdiction problem which it perceives.

The solution to the "problem" which the Ninth Circuit has created is to announce that there is in fact no problem at all. The problem can be eliminated simply by approving the Eighth Circuit approach, which is not to recognize a "reservation Indian" exception to diversity jurisdiction under 28 U.S. C. Sec. 1332.

CONCLUSION

This case presents an important question concerning the nature and extent of federal diversity jurisdiction in actions involving reservation Indians. As matters now rest, a clear conflict exists betwen two Circuit Courts of Appeal on this precise subject. The position now taken by the Ninth Circuit Court of Appeals is, beyond being inconsistent with the Eighth Circuit, legally unsound in and of itself. Furthermore, it represents an abrogation of federal judicial responsibility and it is impractical.

Accordingly this Court should grant Petitioner's Request for a Writ of Certiorari to review this decision of the Ninth Circuit Court of Appeals in this case.

RESPECTFULLY SUBMITTED this 25th day of March, 1986.

Maxon R. Davis
Cure, Borer & Davis
P.O. Box 2103
Great Falls, Montana 59403

March 25, 1986

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

NO. CV-84-131-GF

IOWA MUTUAL INSURANCE COMPANY,
a corporation,

Plaintiff

vs.

EDWARD M. La PLANTE, VERLA LaPLANTE, et al.,

Defendants.

MEMORANDUM AND ORDER

The plaintiff, Iowa Mutual Insurance Company, invokes the diversity jurisdiction of this court and asks the court to declare its rights and liabilities under an insurance contract extant between the plaintiff and the defendants, Wellman Ranch Co., Robert Wellman, Jr., Ramona Wellman, Craig Wellman and Terry Wellman (collectively referred to as the "Wellmans").

The present controversy has its genesis in a traffic accident which occurred within the exterior boundaries of the Blackfeet Indian Reservation, in which Edward LaPlante, an employee of the Wellmans, was injured. LaPlante filed a personal injury suit against the Wellmans in the Blackfeet Tribal Court and an insurance bad faith action against Iowa Mutual centering on Iowa Mutual's investigation and settlement practices.

Noting that all of the named defendants are enrolled members of the Blackfeet Indian Tribe and that the accident at issue occurred on the Blackfeet Indian Reservation, the court must make an immediate inquiry into whether it has jurisdiction over this controversy. In so doing, the court finds that the decision reached by the Court of Appeals for this Circuit in *R.J Williams Co. vs. Fort Belknap Housing Authority*, 719 F. 2d 979 (9th Cir. 1983) to be dispositive of the jurisdictional issue presented. *R.J. Williams* clearly teaches that the assertion of diversity jurisdiction by this court, in the first instance, over a civil controversy arising on an Indian reservation is inappropriate. 719 F. 2d at 983-984. The Blackfeet Tribal Court must be afforded the opportunity to determine its jurisdiction in this matter. Only if the Blackfeet Tribe decides not to exercise its exclusive jurisdiction in this matter, would this court be free to entertain the same under 28 U.S.C. Sec. 1332. Therefore,

IT IS ORDERED that the present action be, and the same hereby is, DISMISSED.

DATED this 20th day of September, 1984.

PAUL G. HATFIELD
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
CA NO. 84-4263
DC NO. CV-84-131-PGH

IOWA MUTUAL INSURANCE COMPANY,
a corporation,
Plaintiff-Appellant,

vs.

EDWARD M. La PLANTE; VERLA LaPLANTE;
ROBERT WELLMAN, JR.; RAMONA WELLMAN;
CRAIG WELLMAN; TERRY WELLMAN; and
WELLMAN RANCH COMPANY, a
dissolved Montana corporation,
Defendants-Appellees.

MEMORANDUM

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding
Argued and submitted July 26, 1985, Seattle, Washington

Before: WALLACE, FARRIS, and HALL, Circuit Judges.

I. FACTS.

On May 3, 1982, Edward LaPlante was injured in a single vehicle truck accident on the Blackfeet Indian Reservation (the Reservation) in Montana. LaPlante was employed at the time of the accident by Wellman Ranch Company (the Ranch), which is located on the Reservation and is owned by Robert, Ramona, Craig, and Terry Wellman (the Wellmans). LaPlante and the Wellmans are Blackfeet Indians residing on the Reservation. LaPlante and his wife Verla (also a Blackfeet Indian) filed a tort action in the Blackfeet Tribal Court against the Ranch and the Wellmans alleging that LaPlante's accident occurred in the course of his employment and as a result of his employer's negligence. The LaPlantes also named Iowa Mutual Ins. Co. (Iowa Mutual), the insurance carrier for the Ranch and the Wellmans, and Iowa Mutual's adjustment agency, Mid-

land Claims Service, Inc. (Midland), as defendants alleging bad faith refusal to settle the LaPlante's claims.

Subsequent to the filing of the tribal court action, Iowa Mutual filed the present diversity action in federal district court against the LaPlantes, the Wellmans, and the Ranch. Iowa Mutual sought a declaratory judgment that it had no duty to indemnify or defend the Ranch or the Wellmans because the LaPlantes claims fell outside the relevant insurance policies. Midland filed a separate action (the Midland action) in federal district court (Iowa Mutual later intervened as a plaintiff). Midland sought a declaration that the tribal court had no jurisdiction over the LaPlantes bad faith claim and an injunction prohibiting the tribal court from proceeding further. The district court dismissed the Midland acton for failure to state a claim and the present action for lack of jurisdiction. The district court's decisions were appealed separately. The present appeal involves only Iowa Mutual's action.

II. ANALYSIS.

Iowa Mutual is an Iowa corporation with its principal place of business in Iowa. All of the defendants are Montana citizens. Although complete diversity exists, the district court dismissed for lack of jurisdiction to permit the Blackfeet Tribal Court to determine whether it would exercise jurisdiction over Iowa Mutual's claims. The court relied upon our recent decision in *R.J. Williams Co. vs. Fort Belknap Housing Authority*, 719 F. 2d 979 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 3476 (1985). The district court's dismissal based upon lack of subject matter jurisdiction is reviewable *de novo. Redding Ford vs. California State Board of Equalization*, 722 F. 2d 496, 497 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 84 (1984).

In *R.J. Williams*, a non-Indian contractor filed suit in federal court against a tribal housing authority which had seized some of the contractor's property pursuant to a tribal court writ of attachment. *R.J. Williams*, 719 F. 2d at 980-81. We initially observed that the contractor's action could

not have been brought in Montana state court because Montana had never assumed general jurisdiction over Indian tribes within its boundaries. *Id.* at 983 & n.3. We noted that where a state court is precluded from hearing a case, a federal district court should also be precluded from hearing the case because federal courts sitting in diversity operate as adjuncts to state courts. *Id. See Woods vs. Interstate Realty Co.*, 337 U.S. 535, 538 (1949).

We concluded in *R.J. Williams*, relying on our decision in *Littell vs. Nakai*, 344 F. 2d 486, 488-89 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966), that federal courts are "divested of diversity jurisdiction whenever the dispute [involves] the exercise of the tribe's responsibility for self-government" but that jurisdiction is not divested "when the tribe has not itself manifested an interest in adjudicating the dispute." *R.J. Williams*, 719 F. 2d at 983-84. Because we were unable to determine whether the tribal court had assumed jurisdiction, we reversed and remanded, holding that the determination of whether diversity jurisdiction existed would have to await the tribal court's decision on whether it would assume jurisdiction. *Id.* at 983 & 985.

R.J. Williams is in accord with *National Farmers Union Insurance Cos. vs. Crow Tribe of Indians*, 105 S. Ct. 2447, 2453-54 (1985), where the Supreme Court recognized that a tribal court may have jurisdiction over non-Indians involved in an accident on non-Indian land within a reservation. The court held that the existence of tribal court jurisdiction should be decided in the first instance by the tribal court itself. *Id.* at 2454.

Iowa Mutual admits that the district court properly applied *R.J. Williams* in this case but argues that *R.J. Williams* should be overruled. However, *R.J. Williams* is the controlling authority in our circuit absent the convening of an en banc court. *LeVick vs. Skaggs Cos.*, 701 F. 2d 777,778 (9th Cir. 1983).

At this stage of the litigation, we express no view as to the tribal court's jurisdiction over the personal injury, bad faith, and insurance contract interpretation issues. We

merely permit the tribal court to initially determine its own jurisdiction. The tribal court's determination can be reviewed later "with the benefit of [tribal court] expertise in such matters." *National Farmers*, 105 S. Ct. at 2454.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
CA NO. 84-4263
DC NO. CV-84-131-PGH

IOWA MUTUAL INSURANCE COMPANY,
a corporation,
Plaintiff-Appellant,
vs.
EDWARD M. La PLANTE; VERLA LaPLANTE;
ROBERT WELLMAN, JR.; RAMONA WELLMAN;
CRAIG WELLMAN; TERRY WELLMAN; and
WELLMAN RANCH COMPANY, a
dissolved Montana corporation,
Defendants-Appellees.

ORDER

Before: WALLACE, FARRIS, and HALL, Circuit Judges.

The panel has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge requested a vote on it. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

BLACKFEET TRIBAL CODE

CHAPTER 1

ADMINISTRATION OF LAW AND ORDER
(Tribal Court)

Sec. 1 **Jurisdiction.** (See clarification of this section in Preface.)

The Blackfeet Tribal Court shall have jurisdiction over all offenses enumerated in Chapter 5, when committed by any Indian as defined by this section, within the Blackfeet Indian Reservation.

With respect to any of the offenses enumerated in Chapter 5 over which federal or state courts may have lawful jurisdiction, the jurisdiction of the Court shall be concurrent and not exclusive. It shall be the duty of the said Court to order delivery to the proper authorities of the State or Federal Government or of any other tribe or reservation for prosecution, any offender, there to be dealt with according to law or regulations authorized by law, where such authorities consent to exercise jurisdiction lawfully vested in them over the said offender. The Blackfeet Tribal Court is a court of "limited jurisdiction." This means that the Court can handle certain types of cases, but cannot handle other types. In order to know whether the Court can handle any particular criminal cases, it is necessary to first know *where* the offense took place, *who* is said to have committed the offense, and what offense is charged. *Where:* The Blackfeet Tribal Court has jurisdiction over matters arising on land within the exterior boundaries of the Blackfeet Indian Reservation. In addition to trust lands belonging to the Tribe or to individual Indians, this includes fee patented lands, townsites, roads and other right-of-ways, and tracts reserved for school, agencies or other governmental purposes. *Who:* The Blackfeet Tribal Court has jurisdiction over all persons of Indian descent who are members of the Blackfeet Tribe of Mon-

tana and over all other American Indians unless its authority is restricted by an order of the Secretary of the Interior. The Court does not have jurisdiction over non-Indians or over Indians from Canada. An Indian subject to the jurisdiction of the Blackfeet Tribal Court, including members of the Blackfeet Tribe, who also is employed in the Bureau of Indian Affairs has a right to appeal from any sentence of the Court to the Secretary of the Interior and the sentence if so appealed, does not become effective until approved by the Secretary.

What Crimes: The Federal courts have jurisdiction over the so-called "ten major crimes;" murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, larceny, and carnal knowledge; and the Federal offenses, such as counterfeiting, mail fraud, etc. As a practical matter, the Federal authorities sometimes turn over to Tribal authorities cases of aggravated assault or petty larceny.

The Blackfeet Tribal Court has exclusive jurisdiction over all crimes set forth in Chapter 5 of the Blackfeet Law and Order Code, which are committed by an Indian, as defined above, against another Indian within the Blackfeet Reservation. These crimes may not be tried in any court other than the Tribal Court. The Blackfeet Tribal Court has *concurrent* jurisdiction over all offenses within the Blackfeet Reservation, other than the ten major crimes, committed by an Indian against a non-Indian or an Indian from Canada. What "concurrent" means, very simply, is that the Federal Court and the Tribal Court both have power to try an offense by an Indian against a non-Indian. Specifically if the Federal authorities consent to take such a case prior to conviction in the Tribal Court, the Tribal Judge *must deliver* the accused to the Government for prosecution and all proceedings in the Tribal Court then stop. If the accused already has been punished in the Tribal Court on the other hand, the Federal authorities are prohibited from prosecuting him again.

Other Cases: A non-Indian who commits an offense against an Indian within the boundaries of the Blackfeet Reservation is punishable in Federal Court in accordance with either the general laws of the United States or State law, depending upon the circumstances. A non-Indian who commits a crime against another non-Indian is, of course, punishable in State Court. A member of the Blackfeet Tribe who commits a crime of any nature outside the Reservation is subject to the law of the jurisdiction in which the offense occurs.

Sec. 2 **Appointment of Judges.**

The Court shall consists of one or more judges, one of whom shall be designated as Chief Judge, and the others as associate judges. Each judge shall be appointed by the Tribal Business Council and Law and Order Committee with the approval of the Commissioner of Indian Affairs. Their salary may be fixed and paid by the Commissioner of Indian Affairs or by the Tribe. Each judge shall hold office for an indefinite period of time, unless sooner removed for cause or by reason of the abolition of said office. In the latter case, he shall be eligible for reappointment.

A person shall be eligible to appointment as judge of the Court only if he (1) is a member of the Blackfeet Tribe and (2) and has never been convicted of a felony, or within one year then past, of a misdemeanor. The age limit of judges shall not be less than 21 years of age. He must also have a high school education, and preferably be a commercial law student at the time of the original appointment.

Sec. 3 **Removal of Judges.**

After notice and hearing, any judge of the Court may be suspended, dismissed or removed by the Law and Order Committee and Tribal Business Council, with the approval of the Commissioner of Indian Affairs.

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that the foregoing Petition for a Writ of Certiorari of Iowa Mutual Insurance Co. was duly served upon the respective attorneys for each of the parties entitled to service by depositing three copies in the United States Mail, prepaid, addressed to each at the last known address as shown on this page on the 25th day of March, 1986.

MAXON R. DAVIS
CURE, BORER & DAVIS
P.O. Box 2103
Great Falls, Montana 59403
Attorneys for Iowa Mutual
Insurance Co.

R.V. BOTTOMLY
JOE BOTTOMLY
SANDRA WATTS
Attorneys at Law
P.O. Box 567
Great Falls, Montana 59403
Co-counsel for Edward M. LaPlante
and Verla LaPlante

FRISBEE, MOORE & STUFFT
Attorneys at Law
P.O. Box 997
Cut Bank, Montana 59427
Attorneys for Robert Wellman, Jr.,
Craig Wellman, Ramona Wellman,
Terry Wellman & Wellman Ranch Co.

No. 85-1589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IOWA MUTUAL INSURANCE COMPANY,

a corporation,

Petitioner,

vs.

EDWARD M. LaPLANTE, VERLA LaPLANTE, ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, TERRY WELLMAN and WELLMAN RANCH COMPANY, a dissolved Montana corporation,

Respondents.

EDWARD M. LaPLANTE AND VERLA LaPLANTES' RESPONSE TO IOWA MUTUAL INSURANCE COMPANY'S PETITION FOR WRIT OF CERTIORARI

JOE BOTTOMLY
BOTTOMLY & GABRIEL
#18 Sixth Street North
P.O. Box A
Great Falls, Montana 59403
(406) 727-4050

No. 85-1589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IOWA MUTUAL INSURANCE COMPANY,

a corporation,

Petitioner,

vs.

EDWARD M. LaPLANTE, VERLA LaPLANTE, ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, TERRY WELLMAN and WELLMAN RANCH COMPANY, a dissolved Montana corporation,

Respondents.

EDWARD M. LaPLANTE AND VERLA LaPLANTES' RESPONSE TO IOWA MUTUAL INSURANCE COMPANY'S PETITION FOR WRIT OF CERTIORARI

JOE BOTTOMLY
BOTTOMLY & GABRIEL
#18 Sixth Street North
P.O. Box A
Great Falls, Montana 59403
(406) 727-4050

QUESTION PRESENTED

Whether a federal district court has diversity jurisdiction over an action prosecuted by a citizen of one state against reservation Indians located in another state.

TABLE OF CONTENTS

	PAGE
I. STATEMENT OF CASE	2
A. Introduction	2
B. Underlying Negligence and Bad Faith Case in Blackfeet Tribal Court	2
C. The Present Case. Iowa Mutual's Federal Declaratory Action Seeking Interpretation of the Insurance Policy	3
D. Federal Declaratory Action Seeking Declaration that the Tribal Court has No Jurisdiction Over LaPlantes' Bad Faith Claim	4
II. SUMMARY OF ARGUMENT	5
III. ARGUMENT	6
A. Under Facts of the Present Case the Positions of the Ninth Circuit and Eighth Circuit are Not in Conflict	6
CONCLUSION	10
APPENDIX	1a

TABLE OF AUTHORITIES

CASES	PAGE
Hot Oil Services, Inc. vs. Hall. 366 F.2d 295 (9th Cir., 1966)	7
Littell vs. Nakai. 344 F.2d 486 (9th Cir., 1965)	7
cert. den., 382 U.S. 986 (1966)	7
National Farmers Union Insurance Companies vs. Crow Tribe of Indians. 471 U.S. _____, 105 S.Ct. 2447 (1985)	4
Poitra vs. Demarrius. 502 F.2d 23	6
cert. den., 421 U.S. 934 (1975)	6
R.J. Williams vs. Fort Belknap Housing Authority. 719 F.2d 979 (9th Cir., 1983)	4
cert. den., 105 S.Ct. 2476 (1985)	7
Woods vs. Interstate Realty Company. 337 U.S. 535 (1949)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1589

IOWA MUTUAL INSURANCE COMPANY,

a corporation,

Petitioner,

vs.

EDWARD M. LaPLANTE, VERLA LaPLANTE, ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, TERRY WELLMAN and WELLMAN RANCH COMPANY, a dissolved Montana corporation,

Respondents.

EDWARD M. LaPLANTE AND VERLA LaPLANTES' RESPONSE TO IOWA MUTUAL INSURANCE COMPANY'S PETITION FOR WRIT OF CERTIORARI

Respondents, Edward M. LaPlante and Verla LaPlante (LaPlantes) respectfully respond to Iowa Mutual's Petition for Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals.

I. STATEMENT OF THE CASE

A. Introduction

Petitioner Iowa Mutual's Writ of Certiorari arises from a diversity action filed in Federal District Court seeking a declaratory judgment that it has no duty to indemnify or defend under insurance policies sold to Blackfeet Indians (Wellmans) and their Ranch Company (Wellman Ranch Co.) for an accident occurring on the Blackfeet Tribal Reservation. Besides the present action the facts of two other related cases are relevant to the Court's discretion to grant Certiorari. One is an action filed in the Blackfeet Tribal Court by the LaPlantes alleging negligence on the part of the Wellmans and bad faith insurance adjusting on the part of Iowa Mutual and Midland Claims. The second is an action filed by Midland Claims (Iowa Mutual intervened as plaintiff) in Federal District Court seeking a declaration that the Tribal Court has no jurisdiction over the LaPlantes' bad faith claim and an injunction prohibiting the Tribal Court from proceeding further.

B. Underlying Negligence and Bad Faith Case in Blackfeet Tribal Court

On May 3, 1982 Edward LaPlante was injured in a single vehicle semi-truck accident on the Blackfeet Indian Reservation in Montana. LaPlante was employed at the time of the accident by the Wellman Ranch Company, which is located on the Blackfeet Reservation and is owned by Robert, Ramona, Craig and Terry Wellman (the Wellmans). LaPlante and the Wellmans are all Blackfeet Indians residing on the reservation. Mr. LaPlante maintains that the accident was the result of his employer's negligence.

Iowa Mutual Insurance Company is the insurer of the Ranch and its Indian owners, the Wellmans. Midland Claims Service, Inc. is an independent insurance adjusting agency who adjusted Mr. LaPlante's claim for Iowa Mutual.

Shortly after Mr. LaPlante was out of the hospital due to

his injuries, Mr. LaPlante was contacted at his residence on the reservation by agents of Midland Claims. After a number of contacts by telephone, letter and in person, a settlement could not be reached and Mr. LaPlante and his wife, Verla LaPlante (also an enrolled Blackfeet Indian) filed a Complaint in Blackfeet Tribal Court.

The Complaint stated two causes of action. Count One stated a negligence personal injury action against the Wellman Ranch and its individual Indian owners. Count Two alleged a bad faith insurance adjusting claim against Iowa Mutual Insurance Company and Midland Claims.

As part of its defense, Iowa Mutual answered the Complaint by stating that Mr. LaPlante's injuries were not covered by any of the insurance policies it had sold to the Wellman Ranch or its individual owners. The LaPlantes have moved for summary judgment on this defense. Both Iowa Mutual and the LaPlantes have briefed and orally argued the issues involved in that motion, i.e., whether Iowa Mutual has a duty to indemnify or defend the Wellmans under the language of the insurance policies. The Blackfeet Tribal Court has taken the motion under advisement and has not yet ruled. The rest of the case is still pending.

C. The Present Case, Iowa Mutual's Federal Declaratory Action Seeking Interpretation of the Insurance Policy

Subsequent to the filing of the Tribal Court action, Iowa Mutual filed the present diversity action in Federal District Court against the LaPlantes, the Wellmans and the Wellman Ranch Company. Iowa Mutual sought a declaratory judgment that it had no duty to indemnify or defend the Ranch or the Wellmans because the LaPlantes' claims fell outside the relevant insurance policies.

The LaPlantes moved to dismiss the declaratory action. In an Order dated September 20, 1984 the United States District Court Judge granted LaPlantes' motion. Noting that all of the named Defendants are members of the Blackfeet Indian Tribe and that the accident scene at issue occurred on the Blackfeet Indian Reservation, the Court relied on *R.J. Williams Company vs. Fort Belknap Housing Authority*,

719 F.2d 979 (9th Cir., 1983) to dispose of the jurisdictional issue presented. Specifically that in a civil controversy arising on the Indian reservation the Blackfeet Tribal Court must be afforded an opportunity to determine its own jurisdiction. Therefore, the assertion of diversity of jurisdiction in the first instance by the Federal Court was inappropriate.

Iowa Mutual appealed to the Ninth Circuit. The Ninth Circuit affirmed the District Court's dismissal of Iowa Mutual's declaratory proceeding. The circuit panel reaffirmed the validity of *R.J. Williams* on the diversity issue. It noted that where a state court is precluded from hearing a case, a Federal District Court should also be precluded from hearing the case as Federal Courts, sitting in diversity, operate as adjuncts to state courts. (Petitioner's Appendix, page 5a, citing *Woods vs. Interstate Realty Company*, 337 U.S. 535, 538 (1949)).

The Ninth Circuit concluded that *R.J. Williams* was consistent with *National Farmers Union Insurance Companies vs. Crow Tribe of Indians*, 105 S.Ct. 2447, (1985). In *National Farmers Union* the Supreme Court recognized that a tribal court may have jurisdiction over non-Indians in an action arising from an accident within the reservation. The Court held that the existence of tribal court jurisdiction is to be decided in the first instance by the tribal court itself. 105 S.Ct. at 2454.

Iowa Mutual sought a rehearing en banc by the entire Ninth Circuit. This request was declined on December 27, 1985, from this decision Iowa Mutual now petitions for a Writ of Certiorari review.

D. Federal Declaratory Action Seeking Declaration that the Tribal Court has No Jurisdiction Over LaPlantes' Bad Faith Claim

Subsequent to the filing of the tribal court action Midland Claims filed a separate action in Federal District Court seeking a declaration that the Blackfeet Tribal Court had no jurisdiction over the LaPlantes' bad faith claim against Midland Claims and Iowa Mutual and and injunction prohibiting the Tribal Court from proceeding further. Iowa Mutual intervened in this action as plaintiff. The LaPlantes as well as the Blackfeet Tribal Court and Blackfeet Tribe were defendants.

Prior to the U.S. Supreme Court's decision in *National Farmers Union Insurance Company vs. Crow Tribe of Indians*, supra, the District Court dismissed Midland's Complaint for failure to state a federal claim upon which relief could be granted. Midland Claims and Iowa Mutual appealed. The U.S. Supreme Court's decision in *National Farmers Union* was then handed down. The Ninth Circuit remanded the appeal to District Court for a determination in light of *National Farmers Union*.

Iowa Mutual, Midland Claims and the LaPlantes cross-moved for summary judgment on the issue of jurisdiction. The Blackfeet Tribal Court and the Blackfeet Tribe moved to dismiss for failure of Midland Claims and Iowa Mutual to exhaust Tribal Court remedies. In a decision dated March 18, 1986 the District Court dismissed Midland Claims' case without prejudice. (Appendix 1a). The Court's decision was based on the fact that Midland Claims and Iowa Mutual had failed to exhaust their remedies under tribal law. Specifically, the jurisdictional issue had not been presented to the Blackfeet Triabl Court of Appeals.

II. SUMMARY OF ARGUMENT

The positions of the Eighth and Ninth Circuit regarding diversity jurisdiction over reservation Indians are not in conflict when applied to the facts of the present case. Both Circuits agree that where Federal diversity jurisdiction would interfere with tribal self-government or where an outsider is attempting to foist non-tribal jurisdiction on Indians, the Federal Court should refuse to accept jurisdiction.

In the present case Iowa Mutual has candidly admitted that it filed the present diversity action in order to avoid tribal court jurisdiction. It fears local prejudice due to the

fact that all of the individual Defendants are members of the Blackfeet Tribe (Petitioner's Brief, page 13). Iowa Mutual is attempting to foist non-tribal jurisdiction on Indian Defendants.

In addition, the acceptance of federal diversity jurisdiction would unduly interfere with the Tribal Court's proceedings which are presently pending. In the LaPlantes' action in Blackfeet Tribal Court, Iowa Mutual raised the defense that its insurance policies did not cover the LaPlantes' in the accident in question. It has also argued that the Tribal Court does not have jurisdiction to decide the insurance coverage issue. These motions and issues have been briefed and argued to the Tribal Court. It has not yet decided the issue. The issues pending in the Tribal Court are identical to those which Iowa Mutual seeks to have determined in the present diversity action. In effect, Iowa Mutual seeks to pre-empt the Tribal Court from deciding the issue. This would unjustly interfere with the Tribe's right of self-government.

Under the facts of this case the positions of the Ninth and Eighth Circuits are the same. Diversity jurisdiction would be refused.

III. ARGUMENT

A. Under Facts of the Present Case the Positions of the Ninth Circuit and Eighth Circuit are Not in Conflict

While it is true there may be conflict between the positions of the Ninth Circuit and Eighth Circuit regarding diversity jurisdiction involving reservation Indians, this case is not an appropriate one to resolve that conflict. Under the undisputed factual circumstances of the present case the positions of the Eighth Circuit and Ninth Circuit are not in conflict.

Iowa Mutual contends that the Eighth Circuit Case of *Poitra vs. Demarrias*, 502 F.2d 23 (1974), cert. denied 421 U.S. 934 (1975) and the Ninth Circuit position articulated most recently by *R.J. Williams vs. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir., 1983), cert. denied 105

S.Ct. 3476 (1985) are in direct conflict on the issue of diversity jurisdiction for reservation Indians. However, in the present case the positions articulated by the Eighth and Ninth Circuit would be the same. Federal jurisdiction would be denied.

In *R.J. Williams* a non-Indian contractor filed suit in Federal Court against the Tribal Housing Authority which had seized some of the contractor's property pursuant to a Tribal Court Writ of Attachment. *R.J. Williams*, 719 F.2d at 908-81. The Ninth Circuit initially observed that the contractor's action could not have been brought in Montana State Court because Montana had never assumed general jurisdiction over Indian tribes within its boundaries. *Id* at 983 and Note 3. It followed its earlier decisions by holding that where a State Court is precluded from hearing a case, a Federal District Court should also be precluded from hearing the case because the Federal Court, sitting in diversity, operates as adjuncts to State Courts. *Id*, citing *Wood vs. Interstate Realty Company*, 337 U.S. 535, 538 (1949); see *Hot Oil Services, Inc. vs. Hall*, 366 F.2d 295 (9th Cir. 1966); *Littell vs. Nakai*, 344 F.2d 486 (9th Cir., 1965), cert. denied 382 U.S. 986 (1966).

The Ninth Circuit concluded that the Federal Courts are divested of diversity jurisdiction whenever the dispute involved the exercise of the tribe's responsibility for self-government, but that jurisdiction was not divested when the tribe has not itself manifested an interest in adjudicating the dispute. Because the Ninth Circuit was unable to determine whether the Tribal Court had assumed jurisdiction, it reversed and remanded holding the determination of whether diversity jurisdiction existed would have to await the Tribal Court's decision on whether or not it would assume jurisdiction. *Id* at 983 and 985.

In *Poitra vs. Demarrias*, supra, a reservation Indian of North Dakota brought a wrongful death action for the death of her son against a South Dakota reservation Indian in the North Dakota Federal District Court. The Eighth Circuit noted that the North Dakota State Court lacked jurisdiction over the civil action because the Indian tribe had not consented to state jurisdiction. It held that an Indian

plaintiff under the circumstances of that case could bring a diversity action regardless of whether the State Court could entertain the action.

The Eighth Circuit specifically indicated that it did not consider the decision in conflict with the position taken by the Ninth Circuit. It distinguished the Ninth Circuit decisions of *Hot Oil Service, Inc. vs. Hall*, 366 F.2d 295 (9th Cir., 1966) and *Littell vs. Nakai*, 344 F.2d 486 (9th Cir., 1965) on the grounds that neither case involved the application of a state created right under which an individual Indian sought to recover from another Indian. The Eighth Circuit noted that the Ninth Circuit's cases were very different in that they involved tribal self-government policies or an attempt by an outsider to "foist jurisdiction" on Indians. *Id.* 28-29. The Eighth Circuit stated:

> "... The refusal by the courts to accept jurisdiction seems correct under those facts." *Id.* at 29.

Thus, where an outsider attempts to use diversity jurisdiction to interfere with self-government policies of the Tribe or "foist" jurisdiction on Indians, the Eighth Circuit agreed with the Ninth Circuit's position that diversity jurisdiction should be denied.

In the present case Iowa Mutual makes no bones of the fact that the individual Defendants are all reservation Indians and that it seeks diversity jurisdiction in order to avoid the jurisdiction of the Blackfeet Tribal Court. (Iowa Mutual's Petition for Writ of Certiorari, page 12-13.) It describes its fear of local prejudice and states that the Blackfeet Judges are, in its opinion, susceptible to political influence. This, Iowa Mutual argues, is because the Judges are Members of the Blackfeet Tribe as are the individual Defendants. The Petitioner fails to note that the judge sitting on the LaPlante case in Tribal Court is not a Blackfeet Indian. He is a Flathead Indian Judge residing on the Flathead Indian Reservation. He was specially appointed to sit on this case by the Blackfeet Tribal Court.

Nevertheless, Petitioner's arguments are ethnocentric. Its own fear of tribal jurisdiction does not justify foisting a

non-tribal jurisdiction on Indians. Under these factual circumstances the positions of the Eighth Circuit and Ninth Circuit are consistent. Diversity jurisdiction would be declined.

Also, Iowa Mutual failed to inform the Court that the identical issue it seeks to have determined in its diversity action is presently pending in the Blackfeet Tribal Court. In Tribal Court, Iowa Mutual raised the defense that the insurance policies sold to the Wellmans did not cover the accident. The LaPlantes have moved the Tribal Court for summary judgment on that defense. The motion has been briefed and orally argued by both parties. As part of its argument, Iowa Mutual requested the Tribal Court to decline jurisdiction on the insurance issue. The Tribal Court's decision on this motion has not as yet been handed down.

The granting of federal diversity jurisdiction in this case would effectively pre-empt the Tribal Court from deciding the issues, involved in the action, which was first filed in its Court. This would be an undue interference with the Tribal Court proceedings. This interference is what this Court spoke of with disfavor in *National Farmers Union Insurance Company vs. Crow Tribe*, 105 S.Ct. 2447 (1985). It is also the type of interference the Eighth Circuit spoke of in *Poitra* when it indicated diversity jurisdiction should be refused in cases involving Tribal self-government policies. *Poitra vs. Demarrias*, supra at 28-29.

Once the Tribal Court has determined the extent of its own jurisdiction to decide the insurance questions and the tribal remedies are exhausted, Iowa Mutual may have an action under 28 U.S.C. 1331 to determine whether the Tribal Court has exceeded its own jurisdiction or an action under 28 U.S.C. 1332 for a declaratory judgment involving the insurance issues. Until such time, however, for the reasons articulated in *National Farmers Union* and in the interest of comity, the extent of the Tribal Court's jurisdiction to determine the insurance issue should be conducted in the first instance by the Tribal Court where the original action was filed and the issue is pending. There does not

appear to be a conflict between the Circuit Courts on these facts.

CONCLUSION

The Writ of Certiorari should be denied. The present case is not an appropriate fact situation to resolve any conflicts which may exist between the Eighth Circuit and Ninth Circuit regarding reservation Indian diversity cases. Under the facts of this case the Eighth Circuit and Ninth Circuit positions do not conflict.

Iowa Mutual is attempting to foist jurisdiction on Indian Defendants. Further, the Tribal Court is presently deciding the issues which Iowa Mutual's diversity action seeks to have litigated. It would be inappropriate for the Federal Court to step in prior to the time the Tribal Court has made its own determination.

DATED this 4th day of April, 1986

BOTTOMLY & GABRIEL
By: Joe Bottomly
P.O. Box A
Great Falls, Montana 59403
Attorneys for Respondents.
Edward M. LaPlante &
Verla LaPlante

CERTIFICATE OF MAILING

I do hereby certify that a true and correct copy of the within Response to Iowa Mutual Insurance Company's Petition for Writ of Certiorari was duly mailed, postage prepaid, on the 16th day of April, 1986, to:

Maxon R. Davis
Cure, Borer & Davis
Attorneys at Law
P.O. Box 2103
Great Falls, Montana 59403

Frisbee, Moore & Stufft
Attorneys at Law
P.O. Box 997
Cut Bank, Montana 59427

Sandra Watts
Attorney at Law
Strain Building
Great Falls, Montana 59401

Lynda C. Brookings
Secretary to Joe Bottomly

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

NO. CV-84-010-GF

MIDLAND CLAIMS SERVICE, INC.
Petitioner,

vs.

EDWARD M. LaPLANTE, et al.
Defendants

IOWA MUTUAL INSURANCE CO.
Plaintiff in Intervention

vs.

EDWARD M. LaPLANTE, et. al.
Defendants

MEMORANDUM AND ORDER

As the record adequately reflects, this is an action for declaratory and injunctive relief filed pursuant to 28 U.S.C. Sec. 1331. The plaintiffs challenge the propriety of the Blackfeet Tribe of Indians asserting civil jurisdiction over those entities in a personal injury and "bad faith" insurance action presently pending in the Blackfeet Tribal Court. The action is now before this court in the wake of the Supreme Court's decision in *National Farmers Union*

Insurance Company vs. Crow Tribe of Indians, 471 U.S. _____, 105 S.Ct. 2447 (1985), for a determination of whether the action should be allowed to proceed, held in abeyance, or dismissed pending exhaustion of the remedies available in the Tribal Court.[1] Having reviewed the record, and applying the rationale espoused in *National Farmers*, the court is compelled to DISMISS this action without prejudice to the plaintiffs pursuing the relief sought after they have exhausted the remedies available under Blackfeet Tribal Law.

The statutory grant of jurisdiction contained in Section 1331 of the Judicial Code will support claims founded upon federal common law. *Illinois vs. City of Milwaukee*, 406 U.S. 91, 100 (1972). The import of the *National Farmers* decision lies primarily in the Court's recognition that Section 1331 vests the federal courts with jurisdiction to determine whether a tribal court has exceeded the lawful limits of its jurisdiction. *National Farmers Union Ins. Co. vs. Crow Tribe*, 105 S.Ct. at 2452. As a secondary consideration, the Court, in the interest of comity, held that the existence and extent of a tribal court's jurisdiction requires an examination which should be conducted in the first instance by the Tribal Court itself. *Id.* at 2454.

The present controversy has its genesis in transactions which occurred within the boundaries of the Blackfeet Indian Reservation. Accordingly, the rationale of *National Farmers* would dictate that the Tribal Court be the first arbiter of whether or not that entity possesses jurisdiction over the subject matter of the controversy, unless the controversy falls within one of the narrow exceptions to the

---

[1] The court notes that the plaintiffs and the defendant LaPlantes have all moved for summary judgment. The Blackfeet Tribe, however, vehemently asserts that resolution of the jurisdictional issue upon the merits by this court is inappropriate until such time as the remedies available the plaintiffs under Blackfeet Tribal law have been exhausted.

exhaustion requirement outlined in the *Farmers Union* case:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith."...or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

105 S.Ct. at 2454 n.21 (citation omitted).

The plaintiffs contend that the present action may proceed to disposition in light of the fact that the Tribal Court has already determined that it possesses jurisdiction over both the subject matter and the parties to this controversy. The remedies available in the Tribal Court system, the plaintiffs submit, have been sufficiently exhausted so as to satisfy the concern for comity which prompted the Court's rationale in *National Farmers*. The plaintiffs further suggest that the present controversy falls within one of the exceptions outlined by the court in *National Farmers*. The court disagrees with both of the plaintiffs' contentions.

The exhaustion requirement recognized by the Court in *National Farmers* is predicated upon the congressional policy of supporting tribal self-government and self-determination. 105 S.Ct. 2545. Recognition of that policy prompts this court to conclude that exhaustion of all remedies available under tribal law is prerequisite to the exercise of this court's jurisdiction under Section 1331. The decision of the Tribal Court regarding its jurisdiction over this controversy has been made at the trial court level; the jurisdictional issue having not, as yet, been presented to the Tribal Court of Appeals. Until such time as the appellate process has been exhausted, this court is precluded from asserting jurisdiction over this controversy pursuant to 28 U.S.C. Sec. 1331. To conclude otherwise, this court would have to ignore the rationale of *National*

Farmers and the congressional policy upon which that rationale is premised.

The plaintiffs next suggest that the Tribal Court's assertion of jurisdiction over the present controversy is violative of the express jurisdictional prohibitions contained in the Constitution and ordinances of the Blackfeet Tribe of Indians. The plaintiffs rely primarily upon Article VI, Section 1(k) of the Tribe's Constitution which vests the Tribal Council with the authority to "... establish minor courts for the adjudication of claims or disputes arising amongst members of the Tribe." The plaintiffs submit that because the Tribal Court is exceeding the express limitation placed upon its jurisdiction, they need not exhaust the remedies available under Blackfeet Tribal law, but may directly proceed to challenge the Tribe's assertion of jurisdiction in federal court pursuant to 28 U.S.C. Sec. 1331. The court disagrees.

The plaintiff's invocation of the limited exception to the exhaustion requirement recognized in *National Farmers* ignores the principle, well recognized in this Circuit, that the interpretation of tribal law is a matter for the tribal courts. *See, A&A Concrete, Inc. vs. White Mountain Apache Tribe*, No. 85-2165 (9th Cir. decided Feb. 6, 1986); *R.J. Williams Co. vs. Fort Belknap Housing Authority*, 719 F.2d 979, 983 (9th Cir. 1983). The court sees no valid distinction between the Tribal ordinances at issue in both *A&A Concrete* and *R.J. Williams* and the Blackfeet Constitution and ordinances at issue in the case at bar. More importantly, however, the plaintiffs' position is premised on a misconception of the exception recognized by the Court in the *National Farmers* case.

28 U.S.C. Sec. 1331 vests federal district courts with jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States." The rationale of the *National Farmers* case does not stand for the proposition that the federal courts are vested with jurisdiction under Section 1331 to interpret the constitutions or laws of the various Indian tribes. Federal question jurisdicton under Section 1331 simply cannot be predicated upon tribal law. *See also, Boe vs. Fort Belknap Indian Communi-*

ty of Fort Belknap, 642 F.2d 276 (9th Cir. 1981). The basis of federal question jurisdiction recognized by the Court in the *National Farmers* case, is that federal common law which has curtailed the sovereign powers of the various Indian tribes. *See, National Farmers*, 105 S.Ct. at 2451-52; *see also, United States vs. Wheeler*, 435 U.S. 313 (1978); *Montana vs. United States*, 450 U.S. 544 (1981). The law upon which the plaintiffs rely in invoking the exception to the exhaustion requirement is not express federal law which has divested the Blackfeet Tribe of jurisdiction over the controversy at issue. Because tribal courts are the first and final arbiters of tribal law, it would be incongruous for this court to conclude that the Court in the *National Farmers* case was referring to anything but federal law when it outlined the exception to the exhaustion requirement.

Review of the record convinces the court that dismissal of this action, without prejudice, is appropriate at this juncture. There exists no compelling reason why the matter should be held in abeyance.

Therefore, for the reasons set forth herein,

IT IS HEREBY ORDERED that the present action be DISMISSED without prejudice.

DATED this 18th day of March, 1986.

PAUL G. HATFIELD
UNITED STATES
DISTRICT COURT JUDGE

No. 85-1589

IN THE

Supreme Court of the United States

October Term, 1985

IOWA MUTUAL INSURANCE COMPANY,
a corporation,
Petitioner,

—vs.—

EDWARD M. LaPLANTE, VERLA LaPLANTE, ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, TERRY WELLMAN and WELLMAN RANCH COMPANY,
a dissolved Montana corporation,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

MAXON R. DAVIS
Cure, Borer & Davis
320 First Nat'l Bank Bldg.
Great Falls, Montana 59403
Telephone: (406) 761-5243
Counsel for Petitioner

JOE BOTTOMLY
Bottomly & Gabriel
#18 6th St. North
Great Falls, Montana 59401
Telephone (406) 727-4050
Counsel for Respondents

PETITION FOR CERTIORARI FILED MARCH 25, 1986
CERTIORARI GRANTED MAY 27, 1986

No. 85-1589

IN THE

Supreme Court of the United States

October Term, 1985

IOWA MUTUAL INSURANCE COMPANY,
a corporation,
Petitioner,

—vs.—

EDWARD M. LaPLANTE, VERLA LaPLANTE, ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, TERRY WELLMAN and WELLMAN RANCH COMPANY,
a dissolved Montana corporation,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

MAXON R. DAVIS
Cure, Borer & Davis
320 First Nat'l Bank Bldg.
Great Falls, Montana 59403
Telephone: (406) 761-5243
Counsel for Petitioner

JOE BOTTOMLY
Bottomly & Gabriel
#18 6th St. North
Great F ' ls, Montana 59401
Telephone (406) 727-4050
Counsel for Respondents

PETITION FOR CERTIORARI FILED MARCH 25, 1986
CERTIORARI GRANTED MAY 27, 1986

TABLE OF CONTENTS

PAGE

Relevant Docket Entries in the Courts Below ii

Complaint (dated 5-22-84) 1

LaPlante's Motion to Dismiss and Motion to Consolidate (dated 6-18-84) 10

LaPlante's Memorandum (dated 6-18-84) 12

Answer of Defendants Robert Wellman, Jr., Ramona Wellman, Craig Wellman, Terry Wellman, and Wellman Ranch Co. (dated 8-21-84) 45

Memorandum and Order Dismissing Plaintiff's Complaint (dated 9-21-84) 47

Notice of Appeal (dated 10-10-84) 48

Memorandum Opinion of the Court of Appeals (dated 9-24-85) 49

Petition for Rehearing and Suggestion for Appropriateness of Rehearing en Banc (dated 10-14-85) 50

Order of Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing en Banc (dated 12-17-85) 56

RELEVANT DOCKET ENTRIES IN THE COURTS BELOW

Docket No.	Date	Item
2	5-22-84	Complaint
5	6-18-84	LaPlante's Motion to Dismiss and Motion to Consolidate
6	6-18-84	LaPlante's Memorandum
11	8-21-84	Answer of Defendants Robert Wellman, Jr., Ramona Wellman, Craig Wellman, Terry Wellman and Wellman Ranch Co.
12	9-21-84	Memorandum and Order Dismissing Plaintiffs' Complaint
13	9-21-84	Judgment - Dismissing Present Action
14	10-10-84	Notice of Appeal
	1-31-85	Brief on Appeal of Appellant Iowa Mutual
	4-5-85	Brief of Appellees LaPlantes
	4-18-85	Reply Brief of Appellant Iowa Mutual
	6-26-85	Oral Argument before Court of Appeals in Seattle
	9-24-85	Memorandum Decision of the Court of Appeals
	10-14-85	Iowa Mutual's Petition for Rehearing and Suggestion of Appropriateness for Rehearing en banc
	12-27-85	Order of Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing en banc

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

IOWA MUTUAL INSURANCE COMPANY,
a corporation,
Petitioner,
—vs.—
EDWARD M. LaPLANTE, VERLA LaPLANTE,
ROBERT WELLMAN, JR., RAMONA WELLMAN,
CRAIG WELLMAN, TERRY WELLMAN and
WELLMAN RANCH COMPANY, a dissolved
Montana corporation,
Defendants

COMPLAINT
No. CV-84-131-GF

PLAINTIFF COMPLAINS AND ALLEGES:

I.

That the plaintiff is an Iowa corporation whose principal place of business is in the State of Iowa.

II.

That all of the defendants are domiciled in the State of Montana and can be considered as citizens of the State of Montana for the purpose of diversity jurisdiction under 28 U.S.C. Sec. 1332.

III.

That this is an action for a declaratory judgment pursuant to 28 U.S.C. Sec. 2201 for the purpose of determining a question of actual controversy between the parties as hereinafter more fully appears.

IV.

That jurisdiction of this action is based upon 28 U.S.C. Sec. 1332 (a) there being diversity of citizenship between the parties and the amount in controversy exceeding $10,000, exclusive of interest and costs.

V.

That the plaintiff has issued various policies of insurance, including automobile liability and farmowner's - ranchowner's, to the defendant Wellman Ranch Co. under which policies of insurance the defendants Robert Wellman, Jr., Ramona Wellman, Craig Wellman and Terry Wellman may be entitled to indemnification and coverage as additional insureds.

VI.

That the defendants Edward M. LaPlante and Verla LaPlante have filed an action against this plaintiff as well as the defendants Robert Wellman, Jr., Ramona Wellman, Craig Wellman, Terry Wellman and Wellman Ranch Co., in the Blackfeet Tribal Court of the Blackfeet Indian Reservation, carrying cause No. 83-CA-180 seeking damages as the result of personal injuries allegedly sustained by the said Edward M. LaPlante; that Exhibit A attached hereto and by this reference made a part hereof is a copy of the Amended Complaint filed in the Blackfeet Tribal Court by the defendants Edward M. LaPlante and Verla LaPlante.

VII.

That neither the allegations of said Amended Complaint nor the facts underlying said Tribal Court proceeding, to the extent they may differ from the allegations of LaPlante's Amended Complaint, fall within the scope, terms or coverage of any insurance policy issued by the plaintiff.

VIII.

That the defendants Edward M. LaPlante and Verla LaPlante take the position that any injuries which they have suffered or sustained do fall within the scope, terms and coverage of plaintiff's insurance policies.

IX.

That the obligation of the plaintiff to indemnify Robert Wellman, Jr., Ramona Wellman, Craig Wellman, Terry Wellman and Wellman Ranch Company for any damages that may be awarded to Edward M. LaPlante and Verla LaPlante and to defend Robert Wellman, Jr., Ramona Wellman, Craig Wellman, Terry Wellman and Wellman Ranch Company from the claims of Edward M. LaPlante and Verla LaPlante is at issue in this proceeding such that they are necessary parties to this action.

WHEREFORE, plaintiff demands Judgment that this Court Adjudge that:

1. That any claims of Edward M. LaPlante and Verla LaPlante for damages arising out of an incident that occurred on or about May 3, 1982, as described in LaPlante's Amended Complaint in the Blackfeet Tribal Court of the Blackfeet Indian Reservation, Cause No. 83-CA-180, fall outside the coverage, scope and terms of any insurance policies issued by the plaintiff;

2. That the plaintiff be relieved of any obligation to indemnify Robert Wellman, Jr., Ramona Wellman, Craig Wellman, Terry Wellman and Wellman Ranch Company for any damages that may be awarded to Edward M. LaPlante or Verla LaPlante in said Tribal Court proceeding;

3. That the plaintiff is under no obligation to defend Robert Wellman, Jr., Ramona Wellman, Craig Wellman, Terry Wellman, and Wellman Ranch Co., from the claims of Edward M. LaPlante, and Verla LaPlante now pending in said Tribal Court proceedings; and

4. That the plaintiff be awarded its costs and disbursement herein incurred and for such other and further relief as to the Court may seem meet and just in the premises.

CURE, BORER & DAVIS

/s/ Maxon R. Davis
Attorneys for the Plaintiff
320 First National Bank Bldg.
Great Falls, Montana 59401

EXHIBIT A

IN THE BLACKFEET TRIBAL COURT
OF THE BLACKFEET INDIAN RESERVATION

EDWARD M. LaPLANTE and
VERLA LaPLANTE,
Plaintiffs,
vs.
IOWA MUTUAL INSURANCE COMPANY,
MIDLAND CLAIMS SERVICE, INC.,
ROBERT WELLMAN, JR., RAMONA
WELLMAN, CRAIG WELLMAN, TERRY
WELLMAN and WELLMAN RANCH
COMPANY, an unincorporated
business entity,
Defendants.

CAUSE NO. 83-CA-180

AMENDED COMPLAINT
AND JURY DEMAND

COUNT ONE

COME NOW the plaintiffs, EDWARD M. LaPLANTE and VERLA LaPLANTE, and for their claim allege as follows:

1. Edward M. LaPlante, Verla LaPlante, Robert Wellman, Jr., Ramona Wellman, Craig Wellman, and Terry Wellman are Indians and members of the Blackfoot Tribe.

2. Edward M. LaPlante was employed by Robert Wellman, Jr., Ramona Wellman, Craig Wellman, Terry Wellman and Wellman Ranch Company, an unincorporated business entity, as a farm laborer. That in the course and scope of his employment he was required to drive a truck.

3. On May 3, 1982, while in the course and scope of his employment in driving a truck for his e ployer, plaintiff, Edward M. LaPlante, was injured.

4. The situs of the accident occurred within the boundaries of the Blackfeet Indian Reservation.

5. The injury occurred because of a defective condition of the truck, known to the employer, but unknown to the plaintiff, Edward M. LaPlante.

6. The plaintiff, Edward M. LaPlante, suffered personal injury, loss of wages, physical pain, and mental suffering and has sustained permanent disability as a result of the accident, together with hospital and medical expenses and loss of a way of and enjoyment of life.

7. The plaintiffs, Edward M. LaPlante and Verla LaPlante, his wife, prior to the time of the accident in question had an excellent marital relationship. As a result of the injury to plaintiff, Edward M. LaPlante, he has had a personality change which has disrupted the domestic tranquility and played havoc with the marital relationship between the parties.

8. The employer, by applicable law, was required to carry Worker's Compensation coverage, but was an uninsured employer; and, therefore, Section 39-71-509 of Montana Code Annotated applies.

9. Had the employer carried Workers' Compensation coverage, plaintiff would have been entitled to all the benefits applicable to his case.

COUNT TWO

10. The plaintiffs reallege all that is contained in Count One and by this reference incorporates Count One into Count Two.

11. Iowa Mutual Insurance Company carried a policy of insurance covering employers, Robert Wellman, Jr.,

Ramona Wellman, Craig Wellman, Terry Wellman and Wellman Ranch Company for all such sums up to the applicable policy limits that the insured, above named, shall become legally obligated to pay as damages because of personal injury resulting from occurrences during the policy.

12. Iowa Mutual Insurance Company employed the firm known as Midland Claims Service, Inc. to make an investigation for them and to approach the plaintiff in view of a settlement of the case.

13. Iowa Mutual Insurance Company and Midland Claims Service, Inc., defendants, used gross negligence and bad faith in dealing with the claim and the plaintiffs in the following manner:

(a) They misrepresented pertinent facts or insurance policy provisions related to coverage at issue;

(b) They failed to acknowledge and act reasonably and promptly upon communications with respect to the claims arising under the insurance policy;

(c) They failed to adopt and implement reasonable standards for the prompt investigation of claims arising under the insurance policy;

(d) They refused to pay the reasonable value of the claim;

(e) They neglected to attempt in good faith to effect prompt, fair and equitable settlement of the claim in which the liability had become reasonably clear;

(f) They compelled the insured to institute litigation to recover amounts due under the insurance policy by offering substantially less than the amount ultimately recovered in actions brought by such insureds.

(g) They attempted to settle the claim for less than the amount which a reasonable man would believe he was entitled to by reference to written or printed advertised material;

(h) They failed to promptly settle the claim when liability had become reasonably clear under one portion of the insurance policy coverage in order to influence settlement under other provisions of the insurance policy or coverage;

(i) They failed to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for the offer of a compromise settlement.

14. The acts of bad faith in this case constituted a common law tort in and of itself, but in addition the act or acts of bad faith constitute a general business practice of the defendant insurer, Iowa Mutual Insurance Company, and Midland Claims Service, Inc.

WHEREFORE, the claimant prays judgment as follows:

1. For all the costs of medical, hospital, dental and other allied medical services as are incurred because of the accident during plaintiff, Edward M. LaPlante's, lifetime.

2. For the loss of wages sustained or which may be sustained during the course of the plaintiff, Edward M. LaPlante's, lifetime as a result of the accident.

3. For a sum of money for physical pain and mental suffering.

4. For a sum of money for the loss of a way of life;

5. For bad faith and exemplary damages in the sum of $5,000,000.00.

6. For the sum of $500,000.00 as and for Verla LaPlante's and her children's claim for loss of consortium.

7. For such other and further relief as the Court deems just and equitable.

DATED this 9th day of March, 1984.

R.V. Bottomly
Joe Bottomly
Sandra K. Watts

/s/ R.V. Bottomly
Attorneys for Plaintiffs
P.O. Box 567
Great Falls, Montana 59403

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

IOWA MUTUAL INSURANCE COMPANY,
a corporation,
Plaintiff,
vs.
EDWARD M. LaPLANTE and VERLA LaPLANTE, ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, TERRY WELLMAN, and WELLMAN RANCH COMPANY, a dissolved Montana corporation,
Defendants.

CAUSE NO. CV-84-131-GF

MOTION TO DISMISS AND
MOTION TO CONSOLIDATE

Defendants, EDWARD M. LaPLANTE and VERLA LaPLANTE, move the Court for an order dismissing Plaintiff's complaint on the grounds that this Court lacks diversity jurisdiction.

Defendants also move the Court for an order consolidating the above captioned case with the case presently pending in this Court entitled MIDLAND CLAIMS SERVICE, INC. , Plaintiff, vs. EDWARD M. LaPLANTE and VERLA LaPLANTE, THE BLACKFEET TRIBE and THE BLACKFEET TRIBAL COURT, defendants. IOWA MUTUAL INSURANCE COMPANY, Plaintiff in Intervention, vs. EDWARD M. LaPLANTE and VERLA LaPLANTE, THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION, a Federal Corporation, and the TRIBAL COURT OF THE BLACKFEET INDIAN TRIBE, Defendants, Cause Number CV-84-101-

GF. Said motion is based on Rule 42(a) of the Federal Rules of Civil Procedure and the attached memorandum.

DATED this 18 day of June, 1984.

JOE BOTTOMLY
R.V. BOTTOMLY
SANDRA K. WATTS

/s/ Joe Bottomly
Attorneys for Defendants,
Edward M. LaPlante and Verla LaPlante
P.O. Box 567
Great Falls, Montana 59403

(Certificate of Mailing deleted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

IOWA MUTUAL INSURANCE COMPANY,
a corporation,
Plaintiff,
vs.
EDWARD M. LaPLANTE and VERLA LaPLANTE, ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, TERRY WELLMAN, and WELLMAN RANCH COMPANY, a dissolved Montana corporation,
Defendants.

CAUSE NO. CV-84-131-GF

MEMORANDUM

INTRODUCTION

There are two declaratory actions presently pending in front of this Court. Both of them involve the same facts and parties. The actions arose as follows:

On May 3, 1982, EDWARD M. LaPLANTE was seriously injured in a traffic accident on Highway 89 within the exterior boundaries of the Blackfeet Indian Reservation. Subsequent to the accident IOWA MUTUAL INSURANCE COMPANY through its adjusting agent MIDLAND CLAIMS, investigated and adjusted the claim with the LaPLANTES on the Indian Reservation.

The LaPLANTES have filed a personal injury action, in Tribal Court, against EDWARD M. LaPLANTE's employer, WELLMAN RANCH and its members ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, and TERRY WELLMAN. The LaPLANTES

have also named IOWA MUTUAL INSURANCE COMPANY and MIDLAND CLAIMS in a count of bad faith insurance adjusting.

MIDLAND CLAIMS filed a declaratory action in Federal Court asking this Court to declare the Tribal Court had no jurisdiction over the bad faith claims against IOWA MUTUAL and MIDLAND CLAIMS. IOWA MUTUAL has since requested the Court to intervene in that action.

IOWA MUTUAL INSURANCE COMPANY has separately filed the present declaratory action seeking to escape coverage under the insurance policy.

MOTION TO DISMISS

This case must be dismissed because the Court lacks diversity jurisdiction. Plaintiff, IOWA MUTUAL, has alleged this Court has jurisdiction based on 28 U.S.C. §1332(a). This is the diversity of citizenship statute.

In order for a Federal Court to have diversity jurisdiction under 28 U.S.C. §1332, the parties must be of diverse citizenship and the Courts of the state in which the Federal Court sits must be able to entertain the action. Woods vs. Intrastate Realty Company, 337 U.S. 535, 538, 69 Sup. Ct. 1235, 1237, 93 Lawyers Addition 1524 (1949); R.J. Williams Company vs. Fort Belknap Housing Authority, F. 2d _____ (1983).

In addition, in cases involving Indians, diversity jurisdiction is precluded when state jurisdiction would infringe upon the rights of the Indians to self government. R.J. Williams vs. Fort Belknap Housing Authority, _____ F. 2d _____ (1983). For example, in Williams vs. Lee, 358 U.S. 217, 79 Sup. Ct. 269, 3 Lawyers Addition 2d, 251 (1959), the Supreme Court held that the Arizona State Court had no jurisdiction over the subject matter. That case involved a non-Indian operating a general store on the Indian Reservation. The non-Indian brought suit in Arizona State Court to collect for goods sold on credit to a tribal

member. The Court held the State jurisdiction would infringe upon "the right of reservation indians to make their own laws and be ruled by them." 220, 79 Sup. Ct. at 270.

The issue of tribal jurisdiction in the case at bar is identical to the one presented in MIDLAND CLAIMS and IOWA MUTUAL declaratory action, presently before this Court entitled MIDLAND CLAIMS SERVICE, INC., Plaintiff vs. EDWARD M. LaPLANTE and VERLA LaPLANTE, THE BLACKFEET TRIBE, and THE BLACKFEET TRIBAL COURT, Defendants, IOWA MUTUAL INSURANCE COMPANY, Plaintiff in Intervention, vs. EDWARD M. LaPLANTE, and VERLA LaPLANTE, THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION, a Federal Corporation, and THE TRIBAL COURT OF THE BLACKFEET INDIAN TRIBE, Defendants, Cause No. CV-84-010-GF.

Both cases arise from a traffic accident and subsequent insurance claims adjusting on the Indian Reservation. The LaPLANTES have moved for summary judgment in the latter case. Their arguments regarding jurisdiction are briefed in their Memorandum in Support of their Motion. A copy of that Memorandum is attached hereto and by this reference is made a part hereof. The Defendants incorporate these arguments into its present motion. For the reasons stated in the Memorandum the Plaintiffs complaint in the present case must be dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

MIDLAND CLAIMS SERVICE, INC.
Plaintiff,
vs.
EDWARD M. LaPLANTE and VERLA LaPLANTE,
THE BLACKFEET TRIBE, and
BLACKFEET TRIBAL COURT
Defendants.

IOWA MUTUAL INSURANCE COMPANY,
Plaintiff in Intervention
vs.
EDWARD M. LaPLANTE and VERLA LaPLANTE,
THE BLACKFEET TRIBE OF THE
BLACKFEET INDIAN RESERVATION, a
Federal Corporation and TRIBAL
COURT OF THE BLACKFEET INDIAN TRIBE,
Defendants.

CAUSE NO. CV-84-010-GF

MEMORANDUM IN SUPPORT OF
EDWARD M. LaPLANTE'S AND
VERLA LaPLANTE'S MOTION
FOR SUMMARY JUDGMENT

THE ISSUE

The issue presented to the Court by this Motion for Summary Judgment is whether the Blackfeet Tribal Court has jurisdiction over a third party action against an insurance company for bad faith, when the insurance policy was sold to an Indian residing on the reservation, the injured

person is an Indian residing on the reservation, the accident occurred on the reservation, and investigation and settlement offers were made on the reservation.

FACTS

EDWARD M. LaPLANTE and VERLA LaPLANTE are enrolled members of the Blackfeet Tribe, residing on the Blackfeet reservation. EDWARD M. LaPLANTE's employer is the Wellman Ranch, whose members consist of Ramona Wellman and her children Robert Wellman, Jr., Craig Wellman, and Terry Wellman. All of the Wellmans' are enrolled members of the Blackfeet Tribe, residing on the reservation.

On May 3, 1982, EDWARD M. LaPLANTE was seriously injured in an automobile accident. The accident occurred on Highway 89 within the boundaries of the reservation. The accident occurred while EDWARD M. LaPLANTE was in the course and scope of his employment. The Wellmans' had no Workers' Compensation insurance. Mr. LaPLANTE contends the accident was due to the defective condition of the vehicle resulting from his employer's negligence.

IOWA MUTUAL INSURANCE COMPANY is the insurer of the Wellman Ranch. Soon after Mr. LaPLANTE was out of the hospital he was contacted at his residence by IOWA MUTUAL's adjusting agent, MIDLAND CLAIMS. MIDLAND CLAIMS investigated the case on the reservation. They spoke to the LaPLANTES at their residence and took Mr. LaPLANTE's statement. MIDLAND CLAIMS then wrote the LaPLANTE's at their residence offering TWO THOUSAND DOLLARS ($2,000.00) as settlement of the case and refused to negotiate further. (See Edward LaPlante's affidavit.)

The LaPLANTES then brought a personal injury suit in Tribal Court against the Wellmans and Wellman Ranch. They also named IOWA MUTUAL INSURANCE COM-

PANY and MIDLAND CLAIMS as defendants, in a separate count, alleging bad faith insurance adjusting. (A copy of said complaint is attached hereto and by this reference made a part hereof.)

IOWA MUTUAL and MIDLAND CLAIMS filed a motion to dismiss in Tribal Court alleging, (among other things), that the Tribal Court had no jurisdiction over the bad faith actions against them. In a memorandum opinion dated February 27, 1984, the Tribal Judge held that the Tribal Court did have jurisdiction over the bad faith claims. (A copy of said memorandum is attached hereto and by this reference made a part herof.)

Concurrently with the tribal proceedings, MIDLAND CLAIMS filed the case at bar requesting this Court to declare that the Tribal Court had no jurisdiction over the bad faith claims and enjoin the LaPLANTES and the Tribal Court from proceeding further.

The LaPLANTES moved to dismiss on the basis that the Blackfeet Tribe was an indispensable party which was not joined. The Court granted the LaPLANTES' motion. MIDLAND CLAIMS has since joined the Blackfeet Tribe and the Tribal Court as defendants. Also, IOWA MUTUAL has since requested the Court for permission to intervene.

THE LAW

INTRODUCTION

The Blackfeet Tribal Court has jurisdiction over the bad faith claims against IOWA MUTUAL and MIDLAND CLAIMS. When IOWA MUTUAL and MIDLAND CLAIMS voluntarily chose to transact business on the Indian reservation with tribal members they submitted themselves to the jurisdiction of the tribe. The United States Supreme Court has repeatedly held that tribes have jurisdiction over persons doing business on the reservation.

Of course, the seminal case is Williams vs. Lee, 358 U.S. 217, 79 Sup. Ct. 269, 3 Lawyers Ed. 2d, 251 (1959). In that case U.S. Supreme Court held that a non-Indian operating a general store on a Navajo Reservation could not bring suit in state court to collect for goods sold to an Indian couple on credit. The Court held the Tribal Court had exclusive jurisdiction of the case. The Court noted it was immaterial that the merchant was not an Indian. It was enough that he was on the reservation and the transaction with an Indian took place there. 538 U.S. at 223.

The Williams case has been followed by recent Supreme Court decisions. In Merrian vs. Jicarilla Apache Tribe, 455, U.S. 130 (1982), the Supreme Court upheld the tribe's severance tax on oil and gas imposed on non-Indians doing business on the reservation. The Court observed that the petitioners "availed themselves of the privilege" of carrying on a business on the reservation, 455 U.S. at 137. The Court specifically accepted the position that the tribe's power over nonmembers necessarily includes power to place conditions on reservation conduct, 455 U.S. at 144. This power derives from the tribe's general authority as sovereign, to control economic activity within its jurisdiction. A nonmember who enters the jurisdiction of the tribe remains subject to the risks that the tribe will exercise its sovereign power, 455 U.S. at 145. Thus, the Court stated that a nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose, 455 U.S. at 147.

In Washington vs. Confederate Tribes of Colville Indian Reservation, 447 U.S. 134, 65 Lawyers Ed. 2d, 10, 100 Sup. Ct. 2069 (1980) the court stated that Indian tribes possess a "broad measure of civil jurisdiction over activities of non-Indians on Indian reservation lands in which tribes have significant interest," 447 U.S. at 152.

In Santa Clara Pueblo vs. Martinez, 436 U.S. 49 (1978), the court specifically approved of its holding in Williams.

436 U.S. at 60, ftn. 9. In that case the Supreme Court also observed "Tribal Courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interest of both Indians and non-Indians, 436 U.S. at 65.

In Montana vs. United States, 450 U.S. 544, the Supreme Court observed that a tribe may regulate the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements. 450 U.S. at 644-65.

The Ninth Circuit has also articulated the inherent power of a tribe to regulate business activities on the reservation. For example, in Snow vs. Quinault Indian Reservation , 709 Fed. 2d 1319 (Ninth Circuit, 1983), the Court upheld a tribe's business fee on a non-Indian doing business on fee land. Citing the Merrian case, the Ninth Circuit observed that the tribe had the general authority to control economic activity on the reservation. 709 Fed. 2d at 1322.

In the present case the insurance company and its adjusting agent subjected itself to the jurisdiction of the Tribal Court by carrying on business activities on the reservation with tribal members. IOWA MUTUAL COMPANY sold a number of insurance policies to the Wellmans. The insurance company charged and received insurance premiums for liability coverage pursuant to its contract. The Wellmans are enrolled members of the Blackfeet Tribe residing on the Indian reservation.

When Wellmans' employee, EDWARD M. La PLANTE, was injured on the reservation, IOWA MUTUAL's adjusting agent, MIDLAND CLAIMS, came on the reservation to investigate and negotiate the case.

It cannot be seriously argued that when IOWA MUTUAL sold liability insurance to Indians on the reservation that they could not anticipate claims arising on the reservation by tribal members. When a claim under this

contract arose on the reservation from an injury of another Indian, the tribe unquestionably had jurisdiction to regulate this economic activity. This power, of course, extended to the Tribal Court's determination of whether the insurance company's conduct violated the requirement of good faith in dealing with the insured party.

The adjusting and negotiating of insurance claims unquestionably affects important societal interests. The State of Montana has specifically adopted statutory prohibition against unfair trade practices by insurance companies in the negotiation and settlement of claims. See generally 33-18-101 etc. RCM. A number of jurisdictions have held that the injured person may sue the insurer directly for bad faith and failure to settle. See e.g. Thompson vs. Commercial Union Insurance Company of New York, 250 S. 2d 259, 264 (Florida, 1971); Royal Globe Insurance Company vs. Superior Court, 23 Cal. 3rd 800, 592 P. 2d 329 (1979); Klaudt vs. Flink, 658 P. 2d 1065 (Montana, 1983); Jenkins vs. J.C. Penney Casualty Insurance Company, 280 S.E. 2d 252 (West Virginia, 1981). Certainly the tribe's interest in requiring insurance companies to act in good faith is no less important than their interest in the recovery of the debt owed on merchandise which was involved in the Williams case. There can be little doubt that the tribe has jurisdiction over the bad faith claim in the present case.

NATIONAL FARMERS UNION INSURANCE
vs. CROW TRIBE

_____ Fed. Sup. _____, 40 Mont. St. Rpt. 783 (1983)

This court, in its memorandum and order dated May 23, 1984, noted without deciding, that the rationale in National Farmers Union Insurance vs. Crow Tribe may be dispositive of the present case. Defendants respectfully submit that the case at bar is significantly different from that case. The distinction lies in the fact that in National Farmers Union, the tort arose on non-Indian land. Whereas in the present case, the tort of bad faith arose on Indian land. This is important because of the significant territorial component of tribal power. See Merrian vs. Jicarilla, supra 455 U.S. at 142.

The LaPLANTES' bad faith claims arose on Indian land within the reservation. The tort of bad faith insurance adjusting "arises" where the payment is to be made to the insured or the beneficiary.

For example, in Whalen vs. Snell, 40 St. Rpt. 1283, ____ F. 2d. _____ (Montana, 1983), the Montana Supreme Court held that the tort of bad faith failure to pay attorneys fees arose from a breach of an obligation where payment was to be made. 40 St. Rpt. 1285. This is consistent with other court cases as well as general law. See for instance Halliwill vs. Mutual Service Casualty Insurance Company, 100 N.W. 2d 817, 818 (1960); Alliance Insurance Company vs Ulysses Volunteer Firemen Relief Fund, 529 P. 2d 171, (Kansas, 1974); 44 Am Jur 2d - Insurance - §1898; 46 CJS Insurance §1196. In the case of a breach of an obligation to pay under an insurance policy, the cause of action arises where the insurer is to pay the loss. This is at the residence of the insured or the beneficiary. Alliance Life Insurance vs. Ulysses Volunteer Firemen Relief Fund supra; Halliwill vs. Mutual Service Casualty Insurance Company, supra.

In the present case the tort of bad faith insurance negotiation arose either at the residence of the insured or the injured party. Both parties are Indians residing on the reservation. Thus, the cause of action against MIDLAND CLAIMS and IOWA MUTUAL INSURANCE COMPANY arose on Indian lands. This case is, therefore, distinguishable from National Farmers Union Insurance in which the tort arose on non-Indian land.

Rather, it falls directly under the Ninth Circuit's holding in Williams Company vs. Belknap Housing Authority, _____ F. 2d _____ (1983). In that case the Ninth Circuit specifically stated that "the Tribal Court is generally the exclusive forum for the adjudication of disputes affecting interests of both Indians and non-Indians which arise on the reservation."

It is important to note that the LaPLANTE's claim of bad faith is a wholly separate tort from the personal injury action. The personal injury action arose from an accident occurring on Highway 89 within the boundaries of the reservation. Plaintiff recognizes there is a split of authority regarding whether an accident on a highway within the boundaries of the reservation, confers sufficient territorial jurisdiction over a nonmember. See State of Wyoming vs. District Court of Ninth Judicial District 617 P. 2d 1056 (Wyoming, 1980), (holding Tribal Court had exclusive jurisdiction of action arising from collision on a highway within an Indian reservation); compare Swift Transportation vs. John, 546 Fed. Supp. 1185 (1982).

The LaPLANTES, of course, maintain that an accident on a U.S. Highway within the reservation confers jurisdiction on the Tribal Court over nonmembers. Nevertheless, the Court need not decide that issue in the present case. As noted above, the claims against IOWA MUTUAL and MIDLAND CLAIMS are distinct from the personal injury action. Therefore, as the analysis above indicates, the law provides that those claims arose on Indian land within the reservation.

CONCLUSION

MIDLAND CLAIMS' and IOWA MUTUAL's business activities on the reservation with members of the tribe subjected them to the sovereign power of the tribe to regulate and control such activities on the reservation. The Blackfeet Tribal Court, therefore, properly has jurisdiction of the bad faith insurance adjusting case which is presently filed by the LaPLANTES against them in Tribal Court.

DATED 17 this day of June, 1984.

JOE BOTTOMLY
R.V. BOTTOMLY
SANDRA K. WATTS

/s/ Joe Bottomly
Attorneys for Defendants
P.O. Box 567
Great Falls, Montana 59403

(Certificate of Mailing deleted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

MIDLAND CLAIMS SERVICE, INC.
Plaintiff,
vs.
EDWARD M. LaPLANTE and VERLA LaPLANTE,
Defendants.

CAUSE NO. CV-84-010-GF

AFFIDAVIT IN SUPPORT OF LaPLANTE'S MOTION TO DISMISS

ss:
STATE OF MONTANA
County of Cascade

I, EDWARD M, LaPLANTE, after being first duly sworn, do say as follows:

1. I am one of the Plaintiffs in the case of Edward M. LaPlante and Verla LaPlante, Plaintiffs, versus Iowa Mutual Insurance Company, Midland Claims Service, Inc., Robert Wellman, Jr., Ramona Wellman, Craig Wellman, Terry Wellman, And Wellman Ranch Company, an unincorporated business entity, Defendants. Said action is filed in the Blackfeet Tribal Court of the Blackfeet Indian Reservation Cause No. 83-CA-180. A copy of the Amended Complaint and Jury Demand is attached hereto as "Exhibit A" and by this reference made part of this Affidavit.

2. My wife Verla LaPlante, my employers Ramona Wellman, as well as her children Robert Wellman, Jr., Craig Wellman, and Terry Wellman are indians and members of the Blackfeet Tribe as am I. We all reside within the boundaries of the Blackfeet Indian Reservation.

3. The place where the accident occurred as alleged in the attached Complaint was within the Blackfeet Indian Reservation.

4. Shortly after I was out of the hospital I was contacted at my home by a person from Midland Claims. He said he was adjusting this case for Iowa Mutual Insurance Company, which is my employer's insurance company. He said that he was investigating the claim on the indian reservation and would like to speak with me. After this conversation, the representative from Midland Claims did in fact come to my residence. He took my tape recorded statement as well as discussed the case with me. This person left his card with me and my wife and told us we should contact Midland Claims.

5. We did call the number provided by the man from Midland Claims. Shortly thereafter at the request of Midland Claims, we came down to Great Falls, and spoke to another representative of Midland Claims.

6. After we returned to our residence on the reservation, we received a letter February 4, 1983, from Stephen Tarrell, an adjustor from Midland Claims. This letter informed us that they would not negotiate with us regarding the settlement of this claim and would only pay a very small amount of my medical bills. A copy of this letter is attached hereto and by this reference made a part of this Affidavit.

Dated this 11 day of June, 1984.

/s/ Edward M. LaPlante

Subscribed and sworn to before me this 11 day of June, 1984.

(Notarial Seal)
Notary Public, State of Montana
Residing at Cut Bank, Montana
My commission expires 4/5/86

(Certificate of Mailing deleted in printing.)

EXHIBIT A
Attached to LaPlante's Affidavit

MIDLAND CLAIMS SERVICE, INC.
P.O. Box 2425
Great Falls, MT 59403

Phone (406) 453-5496

Re: Insured, Wellman Ranch
Date of Loss: 5/3/82
Our File G CM-8374

Michael LaPlante
P.O. Box 542
Browning, MT 59417

February 4, 1983

Dear Mr. LaPlante,

As you are aware, we are the insurance adjusting firm representing Wellman Ranch's insurance company, Iowa Mutual, and have been investigating your accident of May 5, 1982, at which time you were injured. On January 11, 1983, you met with Mr. Ray Kicker at which time he offered you $2,000.00 for the settlement of your claim in its entirety. At that time, you informed him that you would settle for between $70,000.000 and $75,000.00. As your demand is terribly unreasonable, we do not feel it worthwhile even to make a counter offer. If, however, you intend to be reasonable, please contact our office.

We have learned that you will be having surgery for the injury to yourself. Our company supplies $1,000.00 medical payments coverage. We have spoken with your physician who has informed us that his fee for this operation will be $600.00. We have agreed to pay this physician directly that $600.00 following your operation. The remaining $400.00 under the medical payments coverage of this

policy would be directed towards the hospital bill. No additional payment will be made for any medical bills by this office.

We await your reply to our letter.

Sincerely yours,

Midland Claims Service, Inc.

/s/ Stephen R. Terrell, Adjuster

IN THE BLACKFEET TRIBAL COURT
OF THE BLACKFEET INDIAN RESERVATION

EDWARD M. LaPLANTE and
VERLA LaPLANTE,
Plaintiffs,
vs.
IOWA MUTUAL INSURANCE COMPANY,
MIDLAND CLAIMS SERVICE, INC.,
ROBERT WELLMAN, JR., RAMONA
WELLMAN, CRAIG WELLMAN, TERRY
WELLMAN and WELLMAN RANCH
COMPANY, an unincorporated
business entity,
Defendants.

CAUSE NO. 83-CA-180

AMENDED COMPLAINT
AND JURY DEMAND

COUNT ONE

COME NOW the plaintiffs, EDWARD M. LaPLANTE and VERLA LaPLANTE, and for their claim allege as follows:

1. Edward M. LaPlante, Verla LaPlante, Robert Wellman, Jr., Ramona Wellman, Craig Wellman, and Terry Wellman are Indians and members of the Blackfoot Tribe.

2. Edward M. LaPlante was employed by Robert Wellman, Jr., Ramona Wellman, Craig Wellman, Terry Wellman and Wellman Ranch Company, an unincorporated business entity, as a farm laborer. That in the course and scope of his employment he was required to drive a truck.

3. On May 3, 1982, while in the course and scope of his employment in driving a truck for his employer, plaintiff, Edward M. LaPlante, was injured.

4. The situs of the accident occurred within the boundaries of the Blackfeet Indian Reservation.

5. The injury occurred because of a defective condition of the truck, known to the employer, but unknown to the plaintiff, Edward M. LaPlante.

6. The plaintiff, Edward M. LaPlante, suffered personal injury, loss of wages, physical pain, and mental suffering and has sustained permanent disability as a result of the accident, together with hospital and medical expenses and loss of a way of and enjoyment of life.

7. The plaintiffs, Edward M. LaPlante and Verla LaPlante, his wife, prior to the time of the accident in question had an excellent marital relationship. As a result of the injury to plaintiff, Edward M. LaPlante, he has had a personality change which has disrupted the domestic tranquility and played havoc with the marital relationship between the parties.

8. The employer, by applicable law, was required to carry Worker's Compensation coverage, but was an uninsured employer; and, therefore, Section 39-71-509 of Montana Code Annotated applies.

9. Had the employer carried Workers' Compensation coverage, plaintiff would have been entitled to all the benefits applicable to his case.

COUNT TWO

10. The plaintiffs reallege all that is contained in Count One and by this reference incorporates Count One into Count Two.

11. Iowa Mutual Insurance Company carried a policy of insurance covering employers, Robert Wellman, Jr., Ramona Wellman, Craig Wellman, Terry Wellman and Wellman Ranch Company for all such sums up to the applicable policy limits that the insured, above named, shall become legally obligated to pay as damages because of personal injury resulting from occurrences during the policy.

12. Iowa Mutual Insurance Company employed the firm known as Midland Claims Service, Inc. to make an investigation for them and to approach the plaintiff in view of a settlement of the case.

13. Iowa Mutual Insurance Company and Midland Claims Service, Inc., defendants, used gross negligence and bad faith in dealing with the claim and the plaintiffs in the following manner:

(a) They misrepresented pertinent facts or insurance policy provisions related to coverage at issue;

(b) They failed to acknowledge and act reasonably and promptly upon communications with respect to the claims arising under the insurance policy;

(c) They failed to adopt and implement reasonable standards for the prompt investigation of claims arising under the insurance policy;

(d) They refused to pay the reasonable value of the claim;

(e) They neglected to attempt in good faith to effect prompt, fair and equitable settlement of the claim in which the liability had become reasonably clear;

(f) They compelled the insured to institute litigation to recover amounts due under the insurance policy by offering substantially less than the amount ultimately recovered in actions brought by such insureds.

(g) They attempted to settle the claim for less than the amount which a reasonable man would believe he was entitled to by reference to written or printed advertised material;

(h) They failed to promptly settle the claim when liability had become reasonably clear under one portion of the insurance policy coverage in order to influence settlement under other provisions of the insurance policy or coverage;

(i) They failed to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for the offer of a compromise settlement.

14. The acts of bad faith in this case constituted a common law tort in and of itself, but in addition the act or acts of bad faith constitute a general business practice of the defendant insurer, Iowa Mutual Insurance Company, and Midland Claims Service, Inc.

WHEREFORE, the claimant prays judgment as follows:

1. For all the costs of medical, hospital, dental and other allied medical services as are incurred because of the accident during plaintiff, Edward M. LaPlante's, lifetime.

2. For the loss of wages sustained or which may be sustained during the course of the plaintiff, Edward M. LaPlante's, lifetime as a result of the accident.

3. For a sum of money for physical pain and mental suffering.

4. For a sum of money for the loss of a way of life;

5. For bad faith and exemplary damages in the sum of $5,000,000.00.

6. For the sum of $500,000.00 as and for Verla LaPlante's and her children's claim for loss of consortium.

7. For such other and further relief as the Court deems just and equitable.

DATED this 9th day of March, 1984.

R.V. Bottomly
Joe Bottomly
Sandra K. Watts

/s/ R.V. Bottomly
Attorneys for Plaintiffs
P.O. Box 567
Great Falls, Montana 59403

IN THE BLACKFEET TRIBAL COURT
OF THE BLACKFEET INDIAN RESERVATION

EDWARD M. LaPLANTE and
VERLA LaPLANTE,
Plaintiffs,

vs.

IOWA MUTUAL INSURANCE COMPANY,
MIDLAND CLAIMS SERVICE, INC.,
ROBERT WELLMAN, JR.,
Defendants.

MEMORANDUM AND ORDER

January 17, 1984, this case came on for hearing on Defendants', Iowa Mutual Insurance Company and Midland Claims Service, Inc. Motion to dismiss for lack of jurisdiction, insufficiency of process and failure to properly invoke the jurisdiction of the Tribal Court. Plaintiffs Edward and Verla LaPlante appeared through counsel, as did the Defendants, Iowa Mutual and Midland Claims. Defendant Robert Wellman, Jr. made no appearance.

FACTUAL BACKGROUND

For the purpose of reviewing the Defendants' Motion to Dismiss, the Court will take the facts as stated in the Complaint as true.

On May 3, 1982, while employed by Robert Wellman, Jr., Plaintiff Edward LaPlante was injured as a result of an automobile accident. Because of the defective condition of the vehicle he was operating, said condition being known by the owner of the vehicle, Robert Wellman, Jr., Plaintiff wrecked the vehicle. Defendant Iowa Mutual, the insuror of the Wellman vehicle, employed Defendant Midland Claims to investigate the accident on Iowa Mutual's behalf. In investigating and negotiating settlement of Plaintiff LaPlante's claim, Iowa Mutual and Midland Claims engaged in various acts of bad faith, said acts constituting a general business practice.

Defendants Iowa Mutual and Midland Claims attack the Plaintiff's complaint on the grounds that the Tribal Court's jurisdiction has not been properly invoked, and they were not properly served according to Rule 12 (D) (4) of the Tribal Rules of Civil Procedure, Blackfeet Law and Order Code of 1967 as amended. Defendants Iowa Mutual and Midland Claims also argue that even if there had been proper service of process and the Court's jurisdiction properly invoked, they must still be dismissed because the Tribal Court has no jurisdiction, as a matter of federal and Tribal law, over non-indian insurance companies and their agents on the Blackfeet Reservation. Plaintiff LaPlante responds that any defects in service or pleading are not totally defective to the complaint, and that service by mail, as in this case, is within the parameters of the Tribal Code. Relying on past practice and their interpretation of federal Indian law principles, Plaintiffs LaPlante further argue the Tribal Court has jurisdiction over Defendants Iowa Mutual and Midland Claims.

The extent of jurisdiction of the Blackfeet Tribal Court is the same as the jurisdiction of the Tribe-as-a-Tribe. As such, the Court has jurisdiction over the Defendants, Iowa Mutual and Midland Claims, so long as Tribal members or Tribal interests are involved and these Defendants engage in conduct within the Reservation. While the method of process which was employed to give notice to Iowa Mutual and Midland did not comport with the letter of the Tribal Code, it was consistent with the spirit and purpose of the Code, which is to give notice. However, the Plaintiffs have failed to allege sufficient facts upon which the Court can base jurisdiction. Therefore, the Defendants' Motion to Dismiss for lack of jurisdiction and insufficiency of process are denied. The Defendants' Motion to Dismiss because of failure to properly invoke the jurisdiction of the Court is well taken. The Plaintiffs will be given leave to amend their complaint to allege sufficient facts upon which the Court can determine its jurisdiction.

ANALYSIS

I.

Because both Defendants in this case have argued that even if service of process and the proper jurisdictional allegations were made, the Tribal Court would still be without jurisdiction over them, that issue will be addressed first. In determining the extent of the Court's jurisdiction, consideration will be given to federal case law, statutes and treaties, and to the jurisdiction of the Tribal Court under Tribal law.

Both Iowa Mutual and Midland Claims have argued that as a matter of federal law the Blackfeet Tribe is without jurisdiction, with civil regulatory or civil adjudicatory, over the Plaintiffs' assertion of bad faith by these insurance companies in settling Plaintiff's claim. Assuming, as was indicated in the hearing, that the accident out of which this claim arises occurred within the Blackfeet Indian Reservation and that both Defendants, or their agents, engaged in business activities on the Reservation and that both Plaintiffs and Defendant Wellman are Tribal members, the Defendants' argument cannot withstand challenge.

Indian Tribes have long been recognized as semi-sovereign entities with the power to govern the activities of their members and their territory. Wocester vs. Georgia, 31 U.S. 515 (1833); United States vs. Kagama, 118 U.S. 375 (1889); Merrion vs. Jicarilla Apache Tribe, 455 U.S. 130 (1982); United States vs. Wheeler, 435 U.S. 313, 335 (1978).

Tribes, Trans-Canada Enterprises, Ltd. vs. Muckelshoot Indian Tribe, 634 F. 2d 474, 476-77 (9th Cir. 1980), and by virtue of their acceptance into the U.S. Territory, Indian Tribes have been implicitly divested of those attributes of inherent sovereignty which are inconsistent with over-riding national interests. See Generally Confederated Salish & Kootenai Tribes vs. Namen, 665 F. 2d 951, 962-964 (9th Cir. 1982); Babbit Ford, Inc., et al. vs. Navajo Tribe, et al., ——— F.2d ———, 10 ILR 2153, 2157 (9th Cir. 1983).

Thus, while Tribes are not possessed of the full attributes of inherent sovereignty, they do retain "some forms of civil jurisdiction over non-Indians on their Reservations," Montana vs. United States, 450 U.S. 544, 565 (1981). With respect to Tribal Courts, the United States Supreme Court has long recognized these accouterments of Tribal self-government "as the appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. Martinez, 436 U.S. at 65 (citations and footnote omitted).

The power of Indian Tribes to exercise civil jurisdiction over non-members (non-Indians) on their reservations derives from three separate aspects of this inherent sovereignty. In Montana, the United States Supreme Court stated:

> A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. (Citations omitted). A tribe may also retain inherent power over the conduct of non-Indians on fee lands within its Reservation when that conduct threatens or has some direct effect

> on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 464-65 (1981) (Citations omitted). The civil authority exercised in these circumstances derives from the Tribes' power of territorial management within their reservations and their power to protect important interests of the Tribes and their members. Merrion, Supra; Montana, Supra. (Emphasis added.) The third aspect of sovereignty which empowers Indian Tribes to exercise civil authority over the conduct of non-Indians anywhere within their reservations, is the Tribes' power to completely exclude non-members and non-Indians from their Reservations. Merrion vs. Jicarilla Apache Tribe, 455 U.S. 130, 141-44 (1982). When the non-member enters Tribal lands or engages in business with the Tribe or its members, he subjects himself to the civil jurisdiction of the Tribe. Id. at 142.

A.

Both Iowa Mutual and Midland Claims argue that the Blackfeet Tribe has been divested of the inherent power to exercise civil jurisdiction over the activities of non-indian insurance companies engaging in activities within the Blackfeet Reservation. Both Defendants rely on the principles set forth in Montana vs. United States, which are outlined above, in arguing that they have not engaged in any consensual commercial relationships with the Plaintiffs, and that the accident out of which this case arises does not directly affect or threaten the Blackfeet Tribe in any manner. Midland Claims states that the federal cases Swift Transportation vs. John, 546 F. Supp. 1185 (D.C. Army P.) and National Farmers Union Ins. vs. Crow Tribe, control this case. Assuming, again as was stated at oral argument, that the Plaintiffs and Defendant Wellman are members of the Blackfeet Tribe and the accident occurred on the Reservation, the principles of Tribal jurisdiction as set out by the U.S. Supreme Court compel a different conclusion.

Defendant Iowa Mutual entered into a consensual contract with Defendant Wellman to insure against certain risks which might result in injury or loss to Wellman, or for which he might become liable. Assuming Wellman's place of residence and business is the Blackfeet Reservation. It is reasonable to believe that any accident which might be covered by the insurance policy would occur on the Reservation. Further, it is general knowledge that insurance is not free. Wellman and Iowa Mutual thus have a commercial relationship, which, in this case, results in performance of their contract on the Blackfeet Reservation.

In the sense that Iowa Mutual undertook to insure Wellman against exactly the kind of claim being asserted by the Plaintiffs, they stand in his shoes as a member. Iowa Mutual, of course, is not a member of the Tribe. However, Iowa Mutual is obligated to pay, up to the policy limits, if Wellman is found liable by this Court, and they may be required to assert any defenses available to Wellman in any court of law. Indeed it is fair to believe Wellman purchased the insurance just for such a purpose as the incident at issue here.

Midland Claims acts as Iowa Mutual's agent. They gather information from which Iowa Mutual can determine the extent of Wellman's liability. In so doing, Midland engages in various activities including visiting the scene of the accident, interviewing witnesses and interviewing the claimant. In this case, Midland is required to perform these activities on the Blackfeet Reservation. While the site of the accident may have been non-trust land, it nevertheless occurred within the Reservation. This Court disagrees with the Swift Court's determination that the right-of-way status of the highway somehow divests the Tribe of jurisdiction. Especially since in this case the Plaintiffs and Defendant involved in the accident would appear to be Tribal

members, and the Defendants Iowa Mutual and Midland Claims are involved as the result of a consensual commercial relationship with Defendant Wellman. Because of their relationship with Defendant Wellman, the activities of Iowa Mutual and Midland Claims fall squarely within the first prong of the Montana test, thereby allowing the Tribe to exercise jurisdiction over them.

At least where both parties are members of the Tribe, as in this case, the activities of the Defendants Iowa Mutual and Midland Claims, in defending the position of Wellman or paying off on the policy, have a direct effect on or threaten the health and welfare of the Tribe. After all, the Tribe is made up of its members and the welfare and health of the Tribe is a function of the health and welfare of those members. Directly contrary to the arguments of the Courts in National Farmers Union and Swift, the United States Supreme Court has recognized the rights accruing to the tribal entity, in turn accrue to the individual members. See McClanahan vs. Arizona State Tax Commission, 411 U.S. 164, 181 (1973); see also Babbit Ford, 10 ILR at 2155. The underlying dispute between the Tribal members regarding liability for the accident certainly affects the health and welfare of the members involved and their families.

Finally, just by engaging in activities within this Reservation, the Defendants Iowa Mutual and Midland Claims have subjected themselves to the jurisdiction of the Tribe. The place of ultimate performance of the insurance contract, which was purchased by a Tribal member, is on the Blackfeet Reservation. As was correctly noted by the Plaintiff, Tribal Court is the exclusive forum for resolving the dispute between the Tribal members. See Kennerly vs. District Court, ——— U.S. ———, (197—) (Tribal Court exclusive forum for actions by or against Indians arising on the Reservation.)

B.

Both Defendants argue that the Tribal Court's jurisdiction is limited by Article VI, Section F (K) of the Blackfeet Tribal Constitution. The pertinent parts of that provision provide that the Tribal Council shall be empowered "to establish minor courts for the adjudication of claims or disputes arising amongst members of the Tribe ..." Relying on this provision both Iowa Mutual and Midland argue the Tribal Court has no jurisdiction over the non-Indian entities which they operate through. Because this Court has already construed the Constitutional provision relied upon to mean the Tribal Court's jurisdiction is the same as the Tribe's itself, th Defendant's argument has been foreclosed.

In Blackfeet Tribe vs. East Glacier Water and Sewer District, this Court had occasion to address the same arguments with regard to Article VI, Section F (K) as have been made in the instant case. There the Court first gave consideration to the generally low educational level of the Blackfeet people adopting the Constitution, and the beneficial policy behind the Indian Reorganization Act of 1934, 25 U.S.C. §461, et seq., in deciding to apply two cannons of construction often applied in federal Indian law. First, written documents entered into by Indians (the Constitution was also drafted by non-Indians in Washington, D.C.) are to be construed as they probably understood them. Second, that laws passed for the benefit of Indians are to be construed to their benefit.

The Court then considered a variety of factors in construing Article VI, Sec. F (K) to mean the Court's jurisdiction over non-Indian entities would be, essentially, the same as the Tribes', as a Tribe, under federal law. Consideration was given to the probable intent of the original adopters of the Constitution as evidenced by the long-time assumption of Tribal Court jurisdiction over non-Indians on the Reservation; the Indian Civil Rights Act of 1968, 25

U.S.C. § 1301 et seq., which gives non-Indians rights as against Tribal governments which may be exercised in Tribal Court and the Congress' apparent understanding of the jurisdiction of Tribal courts in enacting it; the obvious understanding of the federal court as evidenced by their holdings in Kennerly vs. District Court, 400 U.S. 423 (1971) and Rollengson vs. Blackfeet Tribe, 244 F. Supp. 474 (1965), both of which held the Blackfeet Tribal Court to be the exclusive forum for litigating disputes between non-Indians and the Tribe or its members which arise within the Reservation; and to the general policy consideration favoring jurisdiction over non-Indians in the required circumstances. Important in the policy consideration was the poor economic state of the Reservation and the devastating impact which would occur if non-Indian merchants could not use the Court in creditor-debtor actions against members. The Court felt, in short, that to shut non-Indians out of Tribal Court would destroy the fragile economy of the Reservation.

The Defendants in this hearing argued that it would be a broad interpretation of the Constitutional section at issue if it were construed to allow jurisdiction in this matter. As was recently noted by the Ninth Circuit Court of Appeals, Tribal Courts are the interpreters of Tribal Law. R.J. Williams vs. Ft. Belknap Housing Authority, F.2d —— . ——, 10 ILR, (9th Cir. 1983). This court has determined that the adopters of the organic law of the Blackfeet Tribe intended that the jurisdiction of the Tribal Courts be commensurate with the jurisdiction of the Tribe as a Tribe.

II.

Both Defendants Iowa Mutual and Midland Claims have argued that the Court is without jurisdiction because of insufficiency of service. Their argument is that because they were served by mail, and not in person (physically), as called for by Rule 12 (D)(4), Rules of Civil Procedure, Blackfeet Law and Order Code of 1967 as amended (hereinafter "Rules"), and the mails are not "a person appointed by the Court to serve process," Rule 12 (A) & (C), Rules, service of process in this case was invalid. The Defendants further argue that if they could not be found on the Reservation the complaint should have been left at their place of business with the person in charge. Rule (12) (D) (4). The Court agrees with the Plaintiffs that service of process in this case, though not technically correct, nevertheless served the essential purpose of giving notice and an opportunity to defend.

Tribal Courts are not state courts. While the two Courts serve the same functions, they are organized in different manners and have different approaches to the law. This Court, like many Tribal Courts, is pressed for financial and human resources. Because of this there must be, from time-to-time, deviations from the strict requirements of the Code so that the Court can continue to operate in some manner. Such a situation occurred in this case.

The Tribal Police or a person appointed for that purpose may serve process according to Rule 12 of the Rules. The Tribal Police are now operated by and through the Bureau of Indian Affairs. For some time, including the period prior to and through the filing of the complaint, the Police have refused to serve process. A process server has been employed by the Court at the present and in the past, to serve process. However, at the time the complaint was filed, budget restraints resulted in the process server being layed off for a period. During this interim all process was served by mail. In a sense, the Court appointed the U.S. Post Office as a process server.

What is important is that the Defendants were served and are now able to contest the claims against them. Service of process in the federal courts is now allowed by mail; no doubt because such service is consistent with general motions of fairness and due process. Thus service of process in this case served its essential purpose, and while not technically proper, was valid.

III.

Relying on Chapter F and Chapter 2 §§1-2, Defendant Iowa Mutual argues that the proper jurisdictional allegations were not made, and even if they were, there are no written Tribal laws (legislative laws) to apply to the claims against them, thus the Court should defer to the jurisdiction of the State Courts. The Court agrees with Iowa Mutual's contentions regarding the jurisdictional allegations, but disagrees with the notion that there is no law to apply. Leave will be given to amend the jurisdictional allegations with respect to the location of the accident, the status of the parties (member or non-members) and the contacts the Defendants had with the Reservation.

Legislation is often the product of judicial decisions in a given area which the legislature decides that the area in question needs legislative action. In Montana, this occurred when the State legislature chose to adopt a body of law regulating the practices of insurance companies.

Simply because the Tribal Council has not yet acted does not mean that there can be no law to apply in Tribal Court. An agreement to buy insurance is, after all, a contract. This Court, like other Courts, feels some freedom to determine and apply common law principles which would resolve or guide the resolution of the issues raised by the Plaintiff's complaint. Moreover, the reliance of Iowa Mutual on statement in the Code about concurrent state jurisdiction is misplaced since the Tribal Council repealed and deleted any reference to state law or concurrent state

court jurisdiction by order of Ordinance #44, which was adopted December 13, 1974 and is referenced in the Preface to the Code.

/s/ Judge Donald Dupuis
Presiding by Special Appointment
Blackfeet Tribal Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

IOWA MUTUAL INSURANCE COMPANY,
a corporation,
Plaintiff,
vs.
EDWARD M. LaPLANTE and VERLA LaPLANTE,
ROBERT WELLMAN, JR., RAMONA WELLMAN,
CRAIG WELLMAN, TERRY WELLMAN, and
WELLMAN RANCH COMPANY, a dissolved
Montana corporation,
Defendants.

CAUSE NO. cv-84-131-GF

ANSWER

Robert Wellman, Jr., Ramona Wellman, Craig Wellman, Terry Wellman and Wellman Ranch Company, a dissolved Montana corporation, hereby appear and answer the Complaint of the Plaintiff as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

These Defendants, admit, deny and allege as follows:

1. Deny the allegations of paragraphs I, II, III and IV as they are without knowledge or information sufficient to form a belief as to the truth thereof.

2. Admit the allegations of paragraphs V and VI.

3. Deny the allegation of paragraph VII.

4. Admit the allegation of paragraph VIII.

5. Deny the allegation of paragraph IX.

WHEREFORE, these Defendants having fully answered pray judgment be entered against the Plaintiff and in favor of these Defendants.

DATED This 16th day of August, 1984.

FRISBEE, MOORE & STUFFT
/s/John P. Moore
Attorneys for Defendants
P.O. Box 997
Cut Bank, MT 59427-0997

(Certificate of Mailing deleted in printing.)

MEMORANDUM AND ORDER, United States District Court for the District of Montana, dated 9/20/84.

This document is printed at page 1a of the Appendix to the Petition for a Writ of Certiorari. It is not reprinted here.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

IOWA MUTUAL INSURANCE COMPANY,
a corporation,
Plaintiff,
vs.
EDWARD M. LaPLANTE and VERLA LaPLANTE, ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, TERRY WELLMAN, and WELLMAN RANCH COMPANY, a dissolved Montana corporation,
Defendants.

CAUSE NO. CV-84-131-GF

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN, that IOWA MUTUAL INSURANCE COMPANY, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on the 21st day of September, 1984.

CURE, BORER & DAVIS
/s/ Maxon R. Davis
Attorneys for Plaintiff
320 First National Bank Bldg.
Great Falls, Montana 59401

MEMORANDUM OPINION, United States Court of Appeals for the Ninth Circuit, dated 9/24/85.

This document is printed on page 3a of the Appendix to the Petition for a Writ of Certiorari. It is not reprinted here.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IOWA MUTUAL INSURANCE COMPANY,
a corporation,
Plaintiff-Appellant,
vs.
EDWARD M. LaPLANTE and VERLA LaPLANTE, ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, TERRY WELLMAN, and WELLMAN RANCH COMPANY, a dissolved Montana corporation,
Defendants-Appellees.

CA No. 84-4263
DC No. CV84-131 PGH

PETITION FOR REHEARING AND SUGGESTION FOR APPROPRIATENESS OF REHEARING EN BANC

INTRODUCTION

IOWA MUTUAL INSURANCE COMPANY, the Plaintiff-Appellant above named, hereby petitions the Court of Appeals pursuant to Rule 40 of the Federal Rules of Appellate Procedure for a rehearing of the above-entitled proceeding and hereby suggests to the Court pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure that the rehearing be en banc.

The reason for a rehearing in this case is that, in the undersigned counsel's opinion, the Court of Appeals has overlooked, or at least misapprehended, a material fact, in reaching a conclusion which it did in this case. As will be discussed below, the Court of Appeals has suggested a procedural remedy with which it would, as a practical matter, be impossible to comply.

It would be appropriate to rehear this matter en banc for the reason that the decision of this Court is in direct and clear conflict with a decision from the Eighth Circuit Court of Appeals, Poitra vs. Desmarrias, 502 F. 2d 23 (1974), cert. den'd., 421 U.S. 934 (1975).

ARGUMENT

IOWA MUTUAL INSURANCE COMPANY initiated this action on May 22, 1984, seeking a declaratory judgment pursuant to 28 U.S.C., Sec. 2201 as to the extent of coverage under several insurance policies issued by it. There is no dispute but that Iowa Mutual Insurance Company is an Iowa corporation and that all of the defendants are citizens of Montana. On that basis, diversity jurisdiction would appear to exist under 28 U.S.C., Sec. 1332 (a).

It also appears that all of the individual defendants are Indians and that they reside within the exterior confines of the Blackfeet Indian Reservation.

Feeling itself bound by an earlier decision from this Court of Appeals, R.J. Williams Co. vs. Fort Belknap Housing Authority, 719 F.2d 979, (1983), the District Court dismissed Iowa Mutual's declaratory judgment proceeding, on the basis that Federal diversity jurisdiction could not be found to exist in a lawsuit against Reservation Indians in Montana, since Montana State Courts would appear not to have jurisdiction over the persons of the defendants. In its appeal, Iowa Mutual Insurance Company attacked the R.J. Williams decision and argued that the Court of Appeals should overturn its own precedent, to bring the law of this Circuit in conformity with the law of the Eighth Circuit as expressed in Poitra vs. Desmarrias, 502 F2d 23 (1974), cert. den'd., 421 U S. 934 (1975). At oral argument on June 26, 1985, the three-judge panel which heard Iowa Mutual's appeal noted that they were not empowered to consider Iowa Mutual's attack on the R.J. Williams decision and that the matter could only be considered by this Court of Appeals by

means of a Petition for Rehearing en Banc. We have now followed that panel's suggestion. As this Court of Appeals' own local Rule 12 makes plain, the existence of a conflict between the Ninth Circuit and the Eighth Circuit on the issue of diversity jurisdiction over Indian defendants makes this case an appropriate one for Rehearing en Banc.

Clearly the question of the extent of diversity jurisdiction over Indian defendants is a matter of national application. Indian reservations are located in many states both within and without the Ninth Circuit. There is no logical reason for the diversity jurisdiction of Federal Courts to be different, depending upon the geographic location of those courts. In its enactment of 28 U.S.C., Sec. 1332, Congress has not provided for anything less than uniform rules. The need for a uniform rule on this point is all the more apparent when one considers the great number of tribal jurisdiction disputes which have reached not only this Court but the United States Supreme Court within the past few years. See, for example, National Farmers Union Insurance Companies vs. Crow Tribe of Indians, ——— U.S. ———, 105 S. Ct. 2447 (1985).

Iowa Mutual Insurance Company contends that the position reached by the Eighth Circuit in the Poitra case represents the better reasoned approach. Congress has not acted to limit its statutory grant of diversity jurisdiction in cases involving Reservation Indians. Any limitation on the ability of State Courts to hear civil cases involving Indian defendants was caused not by the states themselves but rather by the Federal judiciary. On that basis, the rationale employed by the Supreme Court in Woods vs. Interstate Realty Co., 337 U.S. 535 (1949) is simply inappropriate.

In considering this Petition for Rehearing, we strongly urge this Court of Appeals to ponder on the practical ramifications of the September 24, 1985 Memorandum decision reached by the three-judge panel which heard this case. That panel feels that the Tribal Court should first deter-

mine its own jurisdiction before a Federal Court can determine the extent of its own diversity jurisdiction. Iowa Mutual Insurance Company has been told to file its declaratory judgment action in Blackfeet Tribal Court, so that the Tribal Court can first determine whether it has jurisdiction over the matter. (As has previously been noted, the Blackfeet Tribal Code contains no provision for declaratory judgment actions). Iowa Mutual Insurance Company filed this proceeding in Federal District Court because — quite frankly — Iowa Mutual Insurance Company has a strong preference for having this matter adjudicated by a Federal Tribunal. Iowa Mutual Insurance Company has no desire to file a declaratory judgment action against local Indian defendants in Blackfeet Tribal Court, whereby that Court can determine the nature and extent of its obligations under various insurance policies issued to those defendants. Yet, the Court of Appeals now expects Iowa Mutual Insurance Company to file its declaratory judgment proceeding in Tribal Court, so as to let the Tribal Court pass upon it. (At least for jurisdictional purposes). In suggesting that Iowa Mutual Insurance Company proceed on this basis, the three-judge panel did take note of the related proceedings that have developed between Iowa Mutual Insurance Company, the LaPlantes and Wellmans. Any familiarity with those proceedings makes plain the fact that the LaPlantes and Wellmans have no objection to the Tribal Court's jurisdiction over them.

Now, Iowa Mutual Insurance Company is being told to files its declaratory judgment against the Wellmans and LaPlantes in Tribal Court so the Tribal Court can determine its own jurisdiction. Quite obviously, the Wellmans and LaPlantes are not going to challenge the Tribal Court's jurisdiction. By filing its own declaratory judgment in Tribal Court, Iowa Mutual Insurance Company will have in effect voluntarily consented to the Tribal Court's jurisdiction over it. How can a plaintiff challenge the jurisdiction of a

court in which it voluntarily files an action? We do not know.

Thus, the September 24, 1985 Memorandum decision from this Court has established a fundamentally impossible and impractical solution to the jurisdictional dispute to which Iowa Mutual Insurance Company's declaratory judgment has given rise.

The September 24, 1985 Memorandum decision is further flawed by the panel's attempt to reconcile its reasoning with the National Farmers decision. The problem is that National Farmers was a federal question case and the principles announced therein are not directly applicable to diversity issues. Diversity cases should be resolved with resort to diversity principles. Those principles are correctly expressed by the Eighth Circuit Court of Appeals in its Poitra decision. By express provision of the Constitution and Laws of the United States, the Indian defendants here are considered citizens of the State of Montana. Plaintiff is a citizen of Iowa. Congress has granted diversity jurisdiction over disputes arising between these citizens. It would be improper for any federal court to limit or abrogate Congress' grant of that jurisdiction, or to make that grant dependent upon a consideration given to a dispute by an Indian Tribal Court. Worse, the suggestion that Iowa Mutual Insurance Company submit this dispute to a tribal court is wholly impractical. The procedure suggested will unavoidably dictate the result to be obtained. Lacking any means to challenge a tribal court's jurisdiction, Iowa Mutual Insurance Company will have been forced to involuntarily submit to it.

CONCLUSION

The September 24, 1985 Memorandum decision from this Court was clearly wrong. Further it compels an impractical result. This Court should rehear and reconsider en banc its decision. Further reflection hopefully will com-

pel a reversal of the position first announced in the R.J. Williams case, so as to bring this Court in line with the Eighth Circuit Court of Appeals, whose decision in Poitra is both legally and practically sound.

DATED this 7th day of October, 1985.

CURE, BORER & DAVIS
/s/ Maxon R. Davis
Attorneys for Iowa Mutual Insurance
Company, Plaintiff-Appellant
P.O. Box 2103
Great Falls, Montana 59403

(Certificate of Mailing deleted in printing.)

ORDER of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing and Suggestion for Rehearing en Banc, dated 12/27/85.

This document is printed at page 6a of the Appendix to the Petition for a Writ of Certiorari. It is not reprinted here.

5

NO. 85-1589

IN THE

Supreme Court of the United States

October Term, 1985

IOWA MUTUAL INSURANCE COMPANY,
a corporation,
Petitioner,

vs.

EDWARD M. LaPLANTE, VERLA LaPLANTE, ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, TERRY WELLMAN and WELLMAN RANCH COMPANY,
a dissolved Montana corporation,
Respondents.

PETITIONER'S BRIEF

MAXON R. DAVIS
CURE, BORER & DAVIS
320 First National Bank Building
P.O. Box 2103
Great Falls, Montana 59403
Telephone: (406) 761-5243

25 pp

NO. 85-1589

IN THE

Supreme Court of the United States

October Term, 1985

IOWA MUTUAL INSURANCE COMPANY,
a corporation,
Petitioner,

vs.

EDWARD M. LaPLANTE, VERLA LaPLANTE, ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, TERRY WELLMAN and WELLMAN RANCH COMPANY,
a dissolved Montana corporation,
Respondents.

PETITIONER'S BRIEF

MAXON R. DAVIS
CURE, BORER & DAVIS
320 First National Bank Building
P.O. Box 2103
Great Falls, Montana 59403
Telephone: (406) 761-5243

QUESTION PRESENTED FOR REVIEW

Whether a Federal District Court has diversity jurisdiction over an action prosecuted by a citizen of one state against reservation Indians located in another state.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES ..... iii, iv, v

CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW 1

JURISDICTION OF THE SUPREME COURT 1

STATUTES WHICH THIS CASE INVOLVES 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 5

A. A litigant's status as a reservation Indian, in and of itself, does not serve to defeat diversity . 5

B. The Erie doctrine does not serve as an adequate justification for a refusal to exercise diversity jurisdiction 6

C. Federal policy towards reservation Indians does not serve as adequate justification for refusal to exercise diversity jurisdiction 9

D. Permitting the exercise of diversity jurisdiction would be consistent with its perceived historical function 13

CONCLUSION 16

CERTIFICATE OF SERVICE BY MAIL 17

TABLE OF AUTHORITIES

CASES PAGE

American Indian Agricultural Credit vs. Fredericks,
551 F. Supp. 1020 (D.Col. 1982) 8

Burgess vs. Seligman,
107 U.S. 20 (1883) 13

David Lupton's Sons Co. vs. Automobile Club,
225 U.S. 489 (1912) 9

Erie R. Co. vs. Tompkins,
304 U.S. 64 (1938) 7, 8
9, 16

Fisher vs. District Court,
424 U.S. 382 (1976) 10

Kennerly vs. District Court,
400 U.S. 423 (1971) 10

McClanahan vs. Arizona Tax Commission,
411 U.S. 164 (1973) ..... 7 - 8

Mechanical Appliance Co. vs. Castleman,
215 U.S. 437 (1910) 12

Meredith vs. Winter Haven,
320 U.S. 228 (1943) 13

Milbank Mutual Ins. Co. vs. Eagleman,
——— Mont. ———, 705 P.2d 1117 (1985) 8

Montana vs. United States,
450 U.S. 544 (1981) 11, 16

National Farmers Union Ins. Cos.
vs. Crow Tribe of Indians, et al,
471 U.S. ——— , 85 L.Ed2d 818 (1985) 4, 11, 12

Oliphant vs. Suquamish Tribe,
435 U.S. 191 (1978) 9, 11

Pease vs. Peck,
59 U.S. 595 (1855) 13

TABLE OF AUTHORITIES (continued)

Poitra vs. Desmarrias,
502 F.2d 23 (8th Cir. 1974), cert. den'd.
421 U.S. 934 (1975) 8

Swift vs. Tyson (U.S.),
16 Pet. 1 (1842) 9

State ex rel Iron Bear vs. District Court,
162 Mont. 335, 512 P.2d 1292 (1973) 8

Superior Oil Co. vs. Merritt,
619 F. Supp. 526 (D. Utah 1985) 9

Sun Sales Corp. vs. Block Island Inc.,
456 F.2d 857 (3rd Cir. 1972) ..... 11 - 12

United States vs. Wheeler,
435 U.S. 313 (1978) 16

Walker vs. Armco Steel Corp.,
446 U.S. 740 (1980) 7

R.J. Williams Co. vs. Fort Belknap Housing Authority,
719 F.2d 979 (9th Cir. 1983), cert. den'd.
——— U.S. ———, 87 L.Ed 2d 612 (1985) 4, 10
11, 12, 13

Williams vs. Lee,
358 U.S. 217 (1959) 7, 8, 9
10, 14

Woods vs. Interstate Realty Co.,
337 U.S. 535 (1949) 6, 7, 8, 9

Worcester vs. Georgia (U.S.),
6 Pet. 515 (1832) 7, 9

UNITED STATES CONSTITUTION
Fourteenth Amendment 5

UNITED STATES CODE
8 U.S.C. Sec. 1401 (a) (2) 5
28 U.S.C. Sec. 1254 1

TABLE OF AUTHORITIES (continued)

28 U.S.C. Sec. 1331 12
28 U.S.C. Sec. 1332 ..... 1, 3, 5, 6
11, 16
28 U.S.C. Sec. 2201 3

MISCELLANEOUS AUTHORITIES

Federal Rules of Civil Procedure:
Rule 12 3
1 Moore's Fed. Practice 13, 15
Montana Codes Annotated, Sec. 33-18-201 3
37 Opinions of the Attorney General of
Montana, Opinion No. 28 at p. 117 2
Note, 79 Harvard Law Review,
851 (1966) 7, 15

CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Neither the opinion of the Federal District Court nor that of the Court of Appeals has been published. Their opinions are, however, both reprinted at pages 1a through 6a of the Appendix to the Petition for a Writ of Certiorari.

JURISDICTION OF THE SUPREME COURT

Iowa Mutual invokes the jurisdiction of this Court under 28 U.S.C., Sec. 1254 (1). Following rendition of the opinion of the Court of Appeals in this matter on September 21, 1985, Iowa Mutual filed a Petition for Rehearing and Suggestion of Appropriateness for Rehearing en Banc. That petition was denied by the Court of Appeals on December 27, 1985. Iowa Mutual filed its Petition for a Writ of Certiorari on March 24, 1986.

STATUTES WHICH THIS CASE INVOLVES

The issue in this case concerns federal diversity jurisdiction under 28 U.S.C., Sec. 1332 (a):

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between -
>
> (1) citizens of different States,"

STATEMENT OF THE CASE

This lawsuit is a declaratory judgment action which was instituted by petitioner Iowa Mutual Insurance Company in the Federal District Court of Montana on May 22, 1984. (J.A., p. 1). In April, 1982, Iowa Mutual had issued a package of insurance policies to the Wellman Ranch, a now-dissolved Montana corporation, whose owners were Ramona Wellman and her three sons, Robert Wellman, Jr.,

Craig Wellman and Terry Wellman. The package contained automobile and farm and ranch policies insuring against property damage and liability. The package also included personal umbrella policies for Rámona Wellman and her three sons.

The Wellman Ranch is located within the exterior boundaries of the Blackfeet Indian Reservation, which itself is located entirely within the State of Montana. The Wellmans are all enrolled members of the Blackfeet Indian Tribe and live on the Reservation. However, the Wellmans purchased the policies in question through an independent insurance agent in Choteau, Montana, which is approximately 45 miles south of the Blackfeet Indian Reservation.

On May 3, 1982, Edward LaPlante, an employee of the Wellman Ranch, was injured in a single-vehicle accident. At the time of the accident, Mr. LaPlante was acting within the scope of his employment. (See J.A., pp. 5-6). He was driving a semi-tractor-trailer hauling cattle from winter to summer pasture. While proceeding up a hill on U.S. Highway 89 at a point within the exterior boundaries of the Reservation, Edward LaPlante lost control of the vehicle. The semi-tractor-trailer began to slide back down the hill. The truck jack-knifed and in the process, Edward LaPlante ended up on the highway pavement.

The Wellmans did not provide workers' compensation insurance for their employees. (J.A., pp. 5-6) Whether the Wellmans as individual Indians or Wellman Ranch, as a Montana corporation, had to do so remains an open question. See 37 Opinions of the Attorney General of Montana, Opinion No. 28, at page 117.

Edward LaPlante and his wife Verla LaPlante filed a lawsuit against the Wellmans on May 3, 1983 for Edward LaPlante's personal injuries and his wife's loss of consortium. The lawsuit was filed in Blackfeet Tribal Court. Like the Wellmans, the LaPlantes are enrolled members of the Blackfeet Tribe. In fact, Edward LaPlante is the son-in-law of Ramona Wellman and brother-in-law of Robert, Craig and Terry Wellman, since his wife Verla is their sister. The

petitioner here, Iowa Mutual Insurance Company, was joined as a defendant with the Wellmans in LaPlantes' tribal court lawsuit. (Midland Claims Service, an independent adjusting firm hired by Iowa Mutual to investigate LaPlantes' claims, was sued in tribal court as well.) The Wellmans are asserted to be liable for LaPlante's personal injuries resulting from the vehicle accident, whereas Iowa Mutual is alleged to be separately liable for bad faith in handling LaPlantes' claims. (See J.A., pp. 6-8) While the legal bases for the "bad faith" claims against Iowa Mutual are as yet undetermined, the allegations in LaPlantes' pleadings in tribal court parrot language contained in the Unfair Trade Practices Act in Montana's Insurance Code, Sec. 33-18-201 of the Montana Codes Annotated. The LaPlantes seek $5,000,000.00 in exemplary damages from Iowa Mutual for these alleged transgressions.

The tribal court proceedings are still pending. Neither LaPlantes' claims against the Wellmans nor their claims against Iowa Mutual and Midland Claims Service have been resolved. Iowa Mutual and Midland Claims Service both moved to have themselves dismissed from that action, but the tribal judge has refused. (See J.A. pp. 33-44)

Iowa Mutual filed this Declaratory Judgment action under 28 U.S.C., Sec. 2201 against the Wellmans and LaPlantes seeking a determination that the LaPlantes' employment-related injury claims against the Wellmans were excluded from the scope of coverage of any of Iowa Mutual's insurance policies issued to the Wellmans. Jurisdiction was predicated on diversity under 28 U.S.C., Sec. 1332. Iowa Mutual is an Iowa corporation, with its principal place of business in DeWitt, Iowa. The LaPlantes and Wellmans are all Montana citizens.

The Wellmans dispensed with a Rule 12 Motion and instead simply filed an answer to the merits of Iowa Mutual's declaratory complaint. (J.A., pp. 45-46) The LaPlantes, however, moved to dismiss the complaint by challenging the District Court's jurisdiction. (J.A., p. 10) An existing

Ninth Circuit decision, R.J. Williams Co. vs. Fort Belknap Housing Authority, 719 F.2d 979 (1983), cert. den'd., ——— U.S. ——— , 87 L.Ed2d 612 (1985) supported LaPlante's position. R.J. Williams appears to say that if a matter is within the jurisdiction of a tribal court, thereby precluding state court jurisdiction, a federal court possesses no diversity jurisdiction over the matter, even if the amount in controversy exceeds $10,000.00 and the litigants are citizens of different states. The tribal court itself is to determine whether or not it possesses jurisdiction over the controversy.

Based on R.J. Williams, the district court granted LaPlantes' Motion to Dismiss. (See Appendix to Petition for Writ of Certiorari, page 3a.) Iowa Mutual appealed. A Ninth Circuit panel reaffirmed the validity of R.J. Williams, which the panel noted could anyway only be modified by the circuit en banc. Furthermore, R.J. Williams was now viewed as consistent with this court's subsequent decision in National Farmers Insurance Cos. vs. Crow Tribe of Indians, et al, 471 U.S. ——— , 85 L.Ed2d 818 (1985). (See App. to Pet., p. 5a.)

Iowa Mutual filed a Petition for Rehearing and Suggestion of Appropriateness of Rehearing en Banc (J.A., p. 50), to see if the entire Circuit would re-examine its R.J. Williams doctrine. The Petition was denied on December 27, 1985. (See App. to Pet., p. 6a) Iowa Mutual's Petition to this Court for Writ of Certiorari followed on March 25, 1986.

SUMMARY OF ARGUMENT

Reservation Indians are by federal law citizens of the states in which they reside. They should be treated as such for diversity purposes. Simply because the federal pre-emption doctrine bars state courts from hearing certain matters involving reservation Indians, it would not be appropriate to invoke the Erie doctrine to view federal courts as equally divested of jurisdiction in diversity cases. Such divestiture in no way furthers any perceived federal Indian policy. It is also inconsistent with the very reasons for which a federal forum has been made available for lawsuits between citizens of different states. The judgment of the Court of Appeals should therefore be reversed.

ARGUMENT

A. A litigant's status as a reservation Indian, in and of itself, does not serve to defeat diversity.

Beginning with the passage of the Judiciary Act of 1789, Congress has acted repeatedly to define the nature and extent of diversity jurisdiction. Limitations continue to exist, under the provisions of the present statute, 28 U.S.C., Sec. 1332. However, none of those limitations, either directly or by implication, serve as a basis to exclude reservation Indians from the class of litigants who may sue or be sued in a federal diversity action.

Sec. 1332 extends diversity jurisdiction to controversies between "citizens of different states." There is no question as to the "citizenship" status of a reservation Indian anymore. While the citizenship of Indians may have been open to question in the last century, in 1924 Congress declared that all Indians born in the United States are natural born American citizens. 8 U.S.C., Sec. 1401 (a) (2). As United States citizens, Indians come within the scope of the 14th Amendment of the United States Constitution:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." (Emphasis added.)

Since the Blackfeet Indian Reservation is located in Montana, the LaPlantes and Wellmans are citizens of Montana. Taking into account the prayer of LaPlantes' Tribal Court complaint, there is no question but that the matter in controversy exceeds $10,000.00. All of the requirements set by Congress to vest a federal district court with diversity jurisdiction under 28 U.S.C., Sec. 1332 are satisfied.

Given that statutory context, the question then becomes whether a judicially-announced policy serves as an adequate basis to disregard this clear Congressional authorization. As discussed below, no such justification exists.

B. The Erie doctrine does not serve as an adequate justification for a refusal to exercise diversity jurisdiction.

As the Court of Appeals has explained itself, its refusal to permit a district court to exercise diversity jurisdiction in a lawsuit against a reservation Indian stems from its interpretation of this Court's decision in Woods vs. Interstate Realty Co., 337 U.S. 535 (1949). Reliance on Woods is misplaced for a number of reasons.

In Woods, this Court agreed that a Tennessee corporation which had failed to qualify to do business in Mississippi, even though it was actually conducting business there, would be precluded from suing a citizen of Mississippi in federal district court in Mississippi, since its failure to do business in that state would foreclose a similar lawsuit in Mississippi state court. Admittedly, there is a fundamental equity about that situation. A federal forum should not be available so as to encourage, or at least countenance, a litigant's violation of state law.

Those facts serve as a basis to distinguish Woods from the presently pending litigation. Interstate Realty Co. could — and should — have qualified to do business in Mississippi. Had it done so, it would have been permitted to maintain its lawsuit in state court there. That being the case, it could have also sued in federal court on the basis of diversity jurisdiction. In other words, the plaintiff there had the ability to rectify the problem that served to preclude exercise of diversity jurisdiction.

The plaintiff here, Iowa Mutual, is presented with a completely different situation. It has not been foreclosed from suing in Montana state courts based upon anything it did or did not do — apart from passing favorably upon an application for insurance from the Wellmans, who admittedly travelled off the Reservation to obtain that insurance. What precludes Iowa Mutual from suing the LaPlantes and the Wellmans in Montana courts is the latters' status as reservation Indians. Iowa Mutual is powerless to effect that situation.

Of course, the underlying rationale behind Woods is the doctrine first announced by this Court in Erie R. Co. vs. Tompkins, 304 U.S. 64 (1938), whereby federal courts hearing diversity cases were instructed to apply state law principles in reaching their decisions. The rationale behind the Erie line of cases has been to foster uniformity in the development of state law. See Walker vs. Armco Steel Corp., 446 U.S. 740, 745 (1980). It manifests a peculiarly judicial concern, which this Court has taken the lead in expressing.

However, it is not the Erie doctrine which serves as the basis for precluding state courts from hearing lawsuits against reservation Indians. It is federal law. That federal policy can be traced to a line of more recent decisions beginning with Williams vs. Lee, 358 U.S. 217 (1959), itself, of course, a lineal descendent of a much older line of authority, dating back to Worcester vs. Georgia (U.S.) 6 Pet. 515 (1832). All of these cases stand for the proposition that the states have no inherent power to regulate the affairs of Indians on a reservation. Williams vs. Lee, supra, at page 220. Originally, this result was justified on the basis that the Indian tribes retained attributes of sovereignty inconsistent with state regulation. While that concept may have had some validity in the 19th century, in more recent times, "tribal sovereignty" has been characterized as not much more than a legal fiction. See Note, 79 Harvard Law Review 851, 853-4 (1966). This Court has itself recognized as much:

> "Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state

jurisdiction and towards reliance on federal pre-emption. See Mescalero Apache Tribe vs. Jones, 411 U.S. 145, 36 L.Ed2d 114, 93 S.Ct. 1267. The modern cases thus tend to avoid reliance upon platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which divide the limits of state power." McClanahan vs. Arizona Tax Commission, 411 U.S. 164, 172 (1973)."

The concept of federal pre-emption of Indian affairs has nothing to do with the Erie doctrine. As described by this Court in Williams vs. Lee, supra, the refusal to permit a state court to exercise jurisdiction over a lawsuit against a reservation Indian was viewed as furthering a federal policy of encouraging "tribal governments and courts to become stronger and more highly organized." Id. at page 220. However, federal pre-emption ought not to be viewed as a justification for pre-empting federal jurisdiction itself. The concept of federal pre-emption has nothing to do with the Erie doctrine and does nothing to further the perceived goals of that doctrine, the development of uniform state law. No state policy is involved in the federal pre-emption of state jurisdiction. Poitra vs. Demarrias, 502 F.2d 23 (8th Cir. 1974), cert. denied 421 U.S. 934 (1975); American Indian Agricultural Credit vs. Fredericks, 551 F.Supp. 1020 (D.Col. 1982). Indeed, insofar as this action is concerned, it must be conceded that Montana law has not created an independent state immunity for reservation Indians; Montana continues to view itself as possessed of full civil jurisdiction over matters involving reservation Indians, unless federally pre-empted. See State ex rel. Iron Bear vs. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), followed in Milbank Mutual Ins. Co. vs. Eagleman, —— Mont. ——, 705 P.2d 1117 (1985). Simply put, if the state itself has not closed the doors of its courthouses to any class of litigants, Woods ought then not to be used to bar the federal door.

If viewed within a strictly historical context, the Erie doctrine has to be looked upon as inapplicable to federal pre-emption of matters involving reservation Indians. One must keep in mind that Erie was not decided until 1938. When Worcester was decided, in the 19th century, federal courts were not as limited by solicitude for state law in diversity cases. See Swift vs. Tyson (U.S.), 16 Pet. 1 (1842). Obviously, Woods vs. Interstate Realty Co. was not within the contemplation of federal courts 100 years ago. See David Lupton's Sons Co. vs. Automobile Club, 225 U.S. 489 (1912). What was, was a recognition (1) that state authority did not extend onto Indian reservations, and (2) that the tribes themselves did not then have judicial systems to which disputes between Indians and outsiders could be referred. See Oliphant vs. Suquamish Tribe, 435 U.S. 191, 197 (1978); Williams vs. Lee, supra, 358 U.S. at 221-222. With neither state nor tribal systems available to resolve disputes between reservation Indians and outsiders, only federal courts were left. See Oliphant vs. Suquamish Tribe, supra. Within such a pre-Erie context, it is difficult to believe that federal pre-emption would serve as a basis to bar federal jurisdiction over actions between tribal members and outsiders. The Erie doctrine has not served to change federal Indian policy. It should therefore not be used as a justification for precluding federal courts from hearing disputes between citizens of one state and citizens of another who just happen to also be reservation Indians.

C. Federal policy towards reservation Indians does not serve as adequate justification for refusal to exercise diversity jurisdiction.

If the Erie doctrine cannot serve as a justification for the position taken by the Court of Appeals, the concept of federal pre-emption of Indian matters would alone have to serve as the basis for justifying a refusal to exercise diversity jurisdiction in cases involving reservation Indians. At least one federal district court has conceded as much when it recently followed the Ninth Circuit approach. Superior Oil Co. vs. Merritt, 619 F. Supp. 526 (D. Utah 1985).

This arugument starts with the premise that a perceived goal of the pre-emption doctrine is to strengthen tribal institutions by insulating them from state interference. Williams vs. Lee, supra, at page 220. It should be kept in mind that pre-emption itself has been viewed as leading to the fulfillment of a Congressional policy, which is "eventually to make all Indians full-fledged participants in American Society." Id.

In R.J. Williams, the Court of Appeals viewed the exercise of diversity jurisdiction as infringing upon tribal self-government, thereby presumptively in conflict with the perceived goal of strengthening tribal institutions. That conclusion is suspect for a number of reasons.

First, in contrast to the problem addressed in Williams vs. Lee, that of subjecting reservation Indians to the jurisdiction of state courts of general jurisdiction, the situation here is more limited. Diversity cases, by definition, would only involve litigation between reservation Indians and citizens of other states. Federal courts would not possess diversity jurisdiction over typical debt collection actions of the type that reached this court in Kennerly vs. District Court, 400 U.S. 423 (1971) and Williams vs. Lee, supra. Nor would federal courts hear domestic relations or adoption proceedings. See Fisher vs. District Court, 424 U.S. 382 (1976). In short, the impact on tribal authority or tribal institutions would be quite limited.

Secondly, no evidence exists that the exercise of diversity jurisdiction would have a negative impact on tribal institutions — specifically on tribal judicial systems. One can concede, for the sake of argument, that the ability of state courts of general jurisdiction to adjudicate all matter of controversies involving reservation Indians would, in fact, undermine tribal judicial systems. The same concession is unwarranted insofar as federal courts exercising diversity jurisdiction are concerned. Undoubtedly, the same type of argument could have been made about the impact of diversity jurisdiction on state judicial systems. History has disproved that idea. State courts have flourished even though diversity jurisdiction has been with us since the first years

of the Nation. There is no reason to suppose the tribal courts will not do likewise.

A third reason for not viewing diversity jurisdiction as negatively impacting tribal court systems is that diversity cases will, by definition, involve controversies that should, for the most part, fall outside the jurisdiction of tribal courts. As yet, the exact boundaries of that jurisdiction have not been firmly fixed. See, for example, National Farmers Union Ins. Companies vs. Crow Tribe of Indians, et al, supra. Nonetheless, this Court has already recognized that the diminished sovereignty of Indian tribes is inconsistent with the notion of tribal authority extending much beyond the internal affairs of the tribe. Montana vs. United States, 450 U.S. 544, 565-66, (1981); Oliphant vs. Suquamish Indian Tribe, supra. . Except in limited circumstances affecting the political integrity, economic security or health and welfare of a tribe, that tribe does not possess civil authority over the activities of non-members of the tribe. Montana vs. United States, supra.

Diversity cases of the type at issue here will always involve non-members. Since the exercise of tribal court jurisdiction will be questionable at best, it stands to reason that the impact on tribal authority, be it positive or negative, will be minimal. Indeed, one should not lose sight of the fact that diversity jurisdiction under 28 U.S.C., Sec. 1332 simply provides an alternative forum, the use of which is never mandated.

Even though this class of cases involves a questionable exercise of tribal jurisdiction, the Court of Appeals would nonetheless have matters first considered by tribal authorities, for them to determine whether they have jurisdiction. R.J. Williams Co., supra, 719 F2d at 983. This perceived solution itself present a number of problems.

First, it amounts to an abrogation of federal judicial responsibility.

> "The diversity jurisdiction of federal courts is even more a matter of significant federal in-

> terest because it is based on the grant of power contained in Article III, Sec. 2, of the Constitution. Its breadth must be determined at federal and not state level and it is appropriate to bow to the state limitations only when they advance some proper state policy." Sun Sales Corp. vs. Block Island Inc., 456 F2d 857, 860 (3rd Cir. 1972).

See also, Mechanical Appliance Co. vs. Castleman, 215 U.S. 437, 443 (1910). By directing that a tribal court first determine whether it possesses jurisdiction (so as then to presumably divest the federal court of diversity jurisdiction), the Court of Appeals has in effect permitted tribal authorities to determine federal jurisdiction.

In its reaffirmation of R.J. Williams in this case, the Court of Appeals asserted that this deferral concept is consistent with the subsequently decided National Farmers Insurance Companies vs. Crow Tribe of Indians, et at, supra. The Court of Appeals is wrong.

Admittedly, this court did order a non-Indian litigant in National Farmers to exhaust its tribal court remedies before mounting a challenge to tribal court jurisdiction. However, National Farmers was a federal question case under 28 U.S.C., Sec. 1331, and the specific question at issue there was the extent of a tribal court's jurisdiction over a non-member of the tribe.

However, this case approaches the problem from precisely the opposite direction. The ultimate question here is not the nature and extent of tribal court jurisdiction, but rather the extent of federal diversity jurisdiction. We do not agree that tribal jurisdiction should impact on resolution of that question, but to the extent it does, the federal judiciary must ultimately determine its own jurisdiction. Deferral is inconsistent with that responsibility.

Furthermore, the approach contemplated by the Ninth Circuit is impractical. The Court of Appeals would have the

tribal court first determine whether the matter in controversy is within its own jurisdiction. Yet, if it is a non-Indian outsider, like Iowa Mutual here, which seeks, as plaintiff, to file a federal diversity action, how is that outsider to obtain a tribal court decision on the jurisdiction question, without voluntarily submitting to that court's jurisdiction at the outset? The Court of Appeals has mandated a procedure which dictates its own result. Furthermore, what type of pleading does the Court of Appeals expect that outside plaintiff to file in tribal court?

Solicitude for native Americans should not lead to unworkable solutions.

D. Permitting the exercise of diversity jurisdiction would be consistent with its perceived historical function.

The Court of Appeals has focused its discussion on the effect which the exercise of diversity jurisdiction would have on tribal courts. R.J. Williams Co., supra, at pages 983-84. As discussed above, the concerns of the Court of Appeals are unwarranted. Equally importantly, by focusing its analysis of the diversity issue on the imagined effect on tribal authority, the Court of Appeals has taken the issue out of its appropriate context.

Diversity jurisdiction was not authorized in the United States Constitution and has not been a part of federal procedure since 1789, based upon any concern about the effect its exercise would have on state courts. Diversity jurisdiction was created for the sake of the parties themselves, not for the benefit or detriment of any court system. See Meredith vs. Winter Haven, 320 U.S. 228, 234 (1943).

> "It is the generally accepted view that diversity jurisdiction was established to provide access to a competent and impartial tribunal, free from local prejudice or influence, for the determination of controversies between citizens of different states." 1 Moore's Fed. Prac., page 701.20

See also Burgess vs. Seligman, 107 U.S. 20, 34 (1883); Pease vs. Peck, 59 U.S. 595 (1855).

Iowa Mutual filed this lawsuit for just such reasons. It has sought a competent and impartial tribunal free from local prejudice or influence to adjudicate its responsibilities under its insurance policies issued to the Wellmans. Iowa Mutual has a very real concern about the competence of the Tribal Court and it has a very real fear of local prejudice, if it has to litigate the extent of any coverage it must provide to the Wellmans, who are Blackfeet Indians, in a proceeding in their tribal court. Under Section 3 of Article I, of the Blackfeet Tribal Code, tribal judges serve at the pleasure of the Tribal Council. (See Appendix to Writ of Certiorari, page 9.) Tribal court judges need not be lawyers. In fact, the only requirements are that they have a high school education, be over 21 years of age and not be a convicted felon. (See Section 2 of Article I of the Blackfeet Tribal Code, at page 9a of the Appendix to the Petition for Writ of Certiorari.) One wonders about the competence of the Tribal Court to hear this type of case, when the Blackfeet Tribal Code does not even authorize declaratory judgment proceedings.

Whether Iowa Mutual's concerns are justified or not is not the issue. Indeed, the competence or prejudice possessed by a local tribunal would in most circumstances be difficult, if not impossible, to prove. However, diversity jurisdiction addresses not the objective manifestations of problems but rather a litigant's subjective concerns about them. Iowa Mutual has those concerns, and to the extent any sort of inquiry into them is warranted, one must concede that there is ample basis for them. To now disregard those concerns, out of solicitude for tribal institutions, is itself unjustified and wholly inconsistent with the very reasons for which the federal diversity forum was made available.

Indeed, if the ultimate goal of federal Indian policy is to make reservation Indians "full-fledged participants in American society," (Williams vs. Lee, supra), one should pause to consider whether the allowance of a federal forum would inhibit or encourage that participation. While concern about local prejudice may have diminished over the

years (at least as regards state courts), one of the principal justifications for the continued existence of diversity jurisdiction has been that it has encouraged the development of interstate commerce.

> "Citizens of different states are also citizens of the United States and they ought to be able to litigate their controversies in a tribunal of the sovereign in which they both belong. This need is especially apparent when the parties are engaged in interstate actions and when problems of conflict of law are involved. There is little doubt that the development of commerce has been aided by the existence of diversity jurisdiction, and, consequently its abolition, especially in regard to corporate usage is not justified by experience." 1 Moore's Federal Prac., page 701.33.

Once again, this lawsuit serves as an excellent example. Social and commercial interaction between reservation Indians and outsiders, both in-state and out-of-state, is to be encouraged. If those relationships are to be encouraged, it would be equally beneficial that reservation Indians be able to obtain and maintain liability insurance, so that third persons injured through their inadvertence or negligence may have a source of compensation for their injuries. Of course, there are no insurance companies located on Indian reservations in Montana. Reservation Indians have to go off the reservation to obtain that insurance. Is that insurance going to be more or less available if insurance companies know that the only forum in which policyholder disputes will be heard will be tribal courts, from which there is no appeal and which have been elsewhere characterized as "unsuited" for dealing with highly sophisticated torts? See Note 79 Harvard Law Review, supra at page 854.

In short, diversity jurisdiction remains justified. Its extension to disputes involving reservation Indians would ultimately prove beneficial, rather than harmful, to reservation Indians. Indeed, given the comparative vacuum within

which tribal courts operate, one can legitimately argue that rather than be harmed somehow, tribal courts would benefit directly from the guidance which the federal courts could provide. In effect, it would be a reverse-Erie situation. No doubt this view will be characterized as paternalistic. However, "paternalism" should be seen here as nothing more than the pejoritive "flip side" of the "diminished sovereignty" status of Indian tribes as recognized by this court. Montana vs. United States, supra, at pages 563-64; United States vs. Wheeler, 435 U.S. 313, 326 (1978).

CONCLUSION

The mere fact that a litigant is an Indian residing on a reservation should not serve to preclude exercise of diversity jurisdiction, if all of the other requirements for its exercise under 28 U.S.C., Sec. 1332 are present. The Erie doctrine does not justify a contrary result. Nor do any competing federal Indian policies — which are in fact not competing at all.

The Judgment of the Court of Appeals should be reversed with instructions that Iowa Mutual be permitted to prosecute this declaratory judgment action in the Federal District Court of Montana.

DATED this 25th day of July, 1986.

Maxon R. Davis
CURE, BORER & DAVIS
P.O. Box 2103
Great Falls, Montana 59403

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that the foregoing PETITIONER'S BRIEF was duly served upon the respective attorneys for each of the parties entitled to service by depositing three copies in the United States Mail, prepaid, addressed to each at the last known address as shown on this page on the 25th day of July, 1986.

MAXON R. DAVIS
CURE, BORER & DAVIS
P.O. Box 2103
Great Falls, Montana 59403
Attorneys for Iowa Mutual
Insurance Co.

R.V. BOTTOMLY
JOE BOTTOMLY
SANDRA WATTS
Attorneys at Law
P.O. Box 567
Great Falls, Montana 59403
Co-counsel for Edward M. LaPlante
and Verla LaPlante

FRISBEE, MOORE & STUFFT
Attorneys at Law
P.O. Box 997
Cut Bank, Montana 59427
Attorneys for Robert Wellman, Jr.,
Craig Wellman, Ramona Wellman,
Terry Wellman & Wellman Ranch Co.

No. 85-1589

In The
Supreme Court of the United States
October Term, 1985

IOWA MUTUAL INSURANCE COMPANY,
a corporation,

Petitioner,

vs.

EDWARD M. LaPLANTE, VERLA LaPLANTE, ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, TERRY WELLMAN and WELLMAN RANCH COMPANY,
a dissolved Montana Corporation,

Respondents.

BRIEF OF RESPONDENTS, VERLA LaPLANTE and EDWARD M. LaPLANTE

Joe Bottomly
Bottomly & Gabriel
#18 Sixth Street North
P.O. Box A
Great Falls, Montana 59403
(406) 727-4050

COCKLE LAW BRIEF PRINTING CO., (800) 228-8845 (tone) 75
or call collect (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether a federal district court has diversity jurisdiction over an action prosecuted by a citizen of one state against Indians residing on a reservation located in another state, when a state court in which the federal court is sitting does not have jurisdiction.

TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	1
A. Introduction	1
B. The Underlying Negligence and Bad Faith Case Pending In Blackfeet Tribal Court	1
C. The Present Case: Iowa Mutual's Declaratory Action Seeking Interpretation of the Insurance Policy	3
II. RELATED ACTIONS	4
A. Midland Claims and Iowa Mutual's Federal Declaratory Action Seeking Declaration That Tribal Court Does Not Have Jurisdiction Over Them In the LaPlantes' Underlying Bad Faith Claim	4
III. SUMMARY OF THE ARGUMENT	5
IV. ARGUMENT	6
A. TRIBAL CIVIL JURISDICTION	6
B. MONTANA STATE COURTS DO NOT HAVE JURISDICTION OF THE PRESENT CASE	13
C. ALLOWING DIVERSITY JURISDICTION IN THE PRESENT CASE WOULD SUBSTANTIALLY INTERFERE WITH TRIBAL SELF-GOVERNMENT	15
D. CONGRESS DID NOT INTEND THE DIVERSITY STATUTE TO PROVIDE A FORUM WHICH WOULD INFRINGE ON THE TRIBE'S ABILITY TO GOVERN ITSELF	21
E. THE RATIONALE OF WOODS AND ERIE IS APPLICABLE TO THE PRESENT CASE	24

TABLE OF CONTENTS—Continued

	Page
F. THE EIGHTH CIRCUIT APPEARS TO BE BACKING AWAY FROM ITS POSITION IN POITRA	28
V. CONCLUSION	30

TABLE OF AUTHORITIES

Page

Table of Cases

Bryan v. Itasca County, 426 U.S. 373 (1976) 23

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1931) 7

Chino v. Chino, 90 N.M. 204, 561 P.2d 476 (1977) 25

City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63 (1941) 24

Erie Railroad v. Tompkins, 304 U.S. 64 (1938) ..... *passim*

Ex Parte Crow Dog, 109 U.S. 556 (1883) 6, 8, 24

Fisher v. Dist. Ct., 424 U.S. 382 (1976) ..... *passim*

Kennerly v. District Court, 400 U.S. 423 (1971) 8, 12, 16, 23

McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) 7

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 6, 7, 12

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) 10

Montana v. Blackfeet Tribe of Indians, 471 U.S. —, 85 L.Ed.2d 753 (1985) 12, 22

Montana v. United States, 450 U.S. 544 (1981) 13

National Farmers Union Insurance Companies v. Crow Tribe of Indians, 471 U.S. —, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985) ..... *passim*

Poitra v. Demarrias, 502 F.2d 23 (8th Cir. 1974), cert. denied 421 U.S. 934 (1975) 28, 29, 30

R.J. Williams Company v. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983) ..... *passim*

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) ..... *passim*

Thomson v. Gaskill, 315 U.S. 442 (1942) 24

TABLE OF AUTHORITIES—Continued

Page

United States v. Wheeler, 435 U.S. 313 (1978) 6, 7, 11, 20

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) 12

Weeks Construction v. Oglala Sioux Housing Authority, — F.2d — (8th Circuit No. 85-5129 and 85-5130) 28, 29, 30

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 6, 7, 9, 11

Williams v. Lee, 358 U.S. 217 (1959) 7, 11, 12, 16, 18

Woods v. Interstate Realty Co., 337 U.S. 535 (1949) ..... *passim*

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 6, 8

Statutes

18 U.S.C., §§ 1153, 3242 (1967) 8

25 U.S.C., §§ 450-450n, 455 (1975) 9, 10

25 U.S.C., § 476 (1970) 11

25 U.S.C., §§ 1301-1341 (1968) 9

25 U.S.C., § 1302 (1968) 18

25 U.S.C., §§ 1321-1326 ..... 9, 21, 23

25 U.S.C., §§ 1451-53, 1461-69, 1481-98 (1974) 10

28 U.S.C., § 1331 23

28 U.S.C., § 1332 21

28 U.S.C., § 1360 (1953) 9

28 U.S.C., § 1362 (1962) 10

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C., § 1625	19
42 U.S.C., § 1996 (1978)	10

MISCELLANEOUS

7 Op. Att'y. Gen. 174 (1855)	8
23 Op. Att'y. Gen. 214 (1900), Op. Sol. Int. Gen. 174 (1855)	8
25 C.F.R. § 11.23 (1985)	27
Canby, Jr., *Civil Jurisdiction and the Indian Reservation* (1973), Utah L. Rev. 206	20, 27
Cohen's Handbook of Federal Indian Law (1982)	*passim*
Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. Rev. 535 (1975)	9
Grover *Jurisdiction: Conflicts of Law and the Indian Reservation: Solutions to Problems in Indian Civil Jurisdiction*, 8 Am. Indian L. Rev. 361 (1980)	20
Restatement (Second) of Conflicts of Law, 556, Comment C, D, F, G & I, § 10, Comments b & e § 145, § 188 (1971)	19
U.S. Code Cong. & Ad. News, 1262, 1263	10

I. STATEMENT OF THE CASE

A. Introduction

This case arises from a diversity action filed in the Montana Federal District Court by an Iowa corporation (Iowa Mutual Insurance Compaay) against certain Blackfeet Indians, who reside on the Blackfeet Reservation (Robert Wellman, Ramona Wellman, Craig Wellman and Terry Wellman (Wellmans), Edward LaPlante and Verla LaPlante (LaPlantes)). The Plaintiff is an insurance company (Iowa Mutual). It sought a declaratory judgment that it had no duty to indemnify or defend under insurance policies it had sold to some of the Defendant Indians (Wellmans) and their wholly owned ranch company (Wellman Ranch). Also joined as Defendants in Iowa's declaratory action are the Indian tort victims (LaPlantes), who seek to recover under the insurance policies against the Wellmans in Tribal Court, for an accident occurring on the reservation. The parties agree that a Montana State Court would not have jurisdiction over the action.

B. The Underlying Negligence and Bad Faith Case Pending In Blackfeet Tribal Court

On May 3, 1982 Edward LaPlante was injured in a single vehicle, semi-truck accident on the Blackfeet Indian Reservation, located in northern Montana. Mr. LaPlante was employed at the time of the accident by the Wellmans and their ranch company, which is located within the boundaries of the Blackfeet Indian Reservation. (J.A. 24-5). The owners of the Wellman Ranch Company (the Wellmans), are all Blackfeet Indians residing on the reserva-

tion. Mr. LaPlante and his wife are also Blackfeet Indians residing on the reservation. (J.A. 24). Mr. LaPlante maintains that the accident was the result of his employer's negligence.

Iowa Mutual Insurance Company is the insurer of the Wellman Ranch and its individual Indian owners. Midland Claims Service is an independent insurance adjusting agency, which adjusted Mr. LaPlante's claim for Iowa Mutual. (J.A. 26).

Shortly after Mr. LaPlante was out of the hospital due to his injuries, Mr. LaPlante was contacted at his residence on the reservation by agents of Midland Claims. (J.A. 25). After a number of contacts by telephone, by letter and in person, a settlement could not be reached and Mr. LaPlante and his wife filed a Complaint in Blackfeet Tribal Court. The Complaint stated two causes of action. Count I stated a negligence personal injury action against the Wellman Ranch and its individual Indian owners. Count II alleged a bad faith insurance adjusting claim against Iowa Mutual Insurance Company and Midland Claims. (J.A. 5-9).

As part of its defense, Iowa Mutual answered the Complaint by stating that the LaPlantes' injuries were not covered by any of the insurance policies it had sold to the Wellmans. The LaPlantes moved for a summary judgment on this defense. This motion is presently pending in the Blackfeet Tribal Court, as is the rest of the case.

C. The Present Case: Iowa Mutual's Declaratory Action Seeking Interpretation of the Insurance Policy

Subsequent to the filing of the underlying Tribal Court action, Iowa Mutual filed the present diversity action in Montana Federal District Court. The asserted basis for federal jurisdiction is diversity jurisdiction. Iowa Mutual, however, has admitted that a Montana state court would not have jurisdiction over some or all of the Indian Defendants, and that these Defendants are necessary parties to the declaratory action. (Brief of App. in 9th Cir. p. 5).

The LaPlantes moved to dismiss the declaratory action. (J.A. 10). In an Order dated September 20, 1984 the United States District Court granted LaPlantes' Motion. (App. to Pet., p. 12). It noted that all the named Defendants are members of the Blackfeet Indian Tribe and that the accident at issue occurred on the Blackfeet Indian Reservation. The District Court held that the assertion of diversity jurisdiction in the first instance by the Federal Court was inappropriate. Relying on *R.J. Williams Company v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), it held that the present civil controversy arose on the Indian Reservation and, therefore, the Blackfeet Tribal Court must be afforded an opportunity first to determine its own jurisdiction.

Iowa Mutual appealed to the Ninth Circuit. The Ninth Circuit affirmed the District Court's dismissal of Iowa Mutual's declaratory action. (App. to Pet., p. 32). The Circuit Panel concluded that *R.J. Williams* was consistent with the recent U.S. Supreme Court case of *National Farmers Union Insurance Companies v. Crow Tribe of*

Indians, 471 U.S. —, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). The Ninth Circuit Panel held that the existence of tribal court jurisdiction in this instance must be decided in the first instance by the tribal court itself. The Court also noted that where a state court is precluded from hearing a case, a Federal District Court should also be precluded, because the Federal Court, sitting in diversity, operates as an adjunct to the state court.

———o———

II. RELATED ACTIONS

A. Midland Claims and Iowa Mutual's Federal Declaratory Action Seeking Declaration That Tribal Court Does Not Have Jurisdiction Over Them in the LaPlantes' Underlying Bad Faith Claim

Besides the present action, Midland Claims and Iowa Mutual filed a separate action in Federal District Court seeking a declaration that the Blackfeet Tribal Court had no jurisdiction over them in the LaPlantes' underlying bad faith claim. Midland Claims and Iowa Mutual sought an injunction prohibiting the Tribal Court from proceeding further. The LaPlantes as well as the Blackfeet Tribal Court and the Blackfeet Tribe were defendants in that case.

The Federal District Court dismissed Midland's and Iowa Mutual's Complaint for failure to state a federal claim upon which relief could be granted. Midland Claims and Iowa Mutual appealed. Subsequent to this appeal the U.S. Supreme Court handed down its decision in *National Farmers Union.* The Ninth Circuit remanded the appeal to District Court for a determination in light of *National Farmers Union.*

Iowa Mutual, Midland Claims and the LaPlantes cross-moved for summary judgment on the issue of jurisdiction. It was agreed by the parties that the Tribal Court had concluded that it did have jurisdiction over the underlying bad faith case. However, the jurisdiction issue had not yet been presented to the Blackfeet Tribal Court of Appeals. For this reason, in a decision dated March 18, 1986, the District Court dismissed the case without prejudice. The Court directed Iowa Mutual and Midland Claims to exhaust their remedies under tribal law.

———o———

III. SUMMARY OF THE ARGUMENT

A federal district court does not have diversity jurisdiction over a case involving reservation Indians, when a state court does not have jurisdiction over the action. The history of the tribal civil jurisdiction and Congress's clear policy of promoting tribal self-government indicate that Congress did not intend for the general diversity statutes to infringe on tribal self-government. Further, the policies of *Erie Railroad v. Tompkins,* 304 U.S. 64 (1938), to discourage forum shopping and unequal protection of the law, would require that diversity jurisdiction not apply to such cases. To permit diversity jurisdiction would deviate from the historical policy of broad civil tribal jurisdiction and would deny Indians the opportunity to develop their legal systems. The judgment of the Ninth Circuit Court of Appeals should, therefore, be affirmed.

———o———

IV. ARGUMENT

A. TRIBAL CIVIL JURISDICTION

Indian tribes have long been recognized, as "distinct, independent political communities, which are qualified to exercise powers of self-government." *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559 (1832); *United States v. Wheeler,* 435 U.S. 313, 322-324 (1978); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55 (1978); *National Farmers Union,* 85 L.Ed.2d at 824; *Ex Parte Crow Dog,* 109 U.S. 556 (1883); *Fisher v. Dist. Ct.,* 424 U.S. 382, 386 (1976); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 137 (1982); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980).

In *Worcester,* the State of Georgia attempted to extend its criminal jurisdiction to reservation lands and remove two white men who lived with the Cherokees with tribal consent. Chief Justice John Marshall analyzed the relationship between tribe with both state and federal governments. He also reviewed the history of the Cherokee Tribe's relations with Great Britain and the United States. He described the Cherokee Nation as a "distinct political community" with the necessary inherent powers of self-gevornment. 31 U.S. (6 Pet.) 515, 561 (1832).

In *Crow Dog,* the Supreme Court recognized the tribes' exclusive criminal jurisdiction over tribal members as a retained aspect of tribal sovereignty. It acknowledged the tribes retained their power of "self-government". This tribal jurisdiction remains with the tribes unless removed by specific legislation or a treaty, or by necessity of its coming under the protection of the United States.

The tribes' sovereignty is, of course, not complete. Their dependent status makes tribes subject to the plenary power of the federal government. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 (1980). *U.S. v. Wheeler,* 435 U.S. at 323. Congress, by treaty or statute, undoubtedly has power to limit tribal powers. Also, in a few areas a tribe's sovereign power may also be implicitly lost by virtue of its incorporation within the United States. For example, the tribes' authority to deal directly with nations other than the United States is limited. See *U.S. v. Wheeler,* 435 U.S. at 326; *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1931).

The precise boundary of tribal power is sometimes difficult to identify because such power is not attributable to any delegation, but rather to the tribe's retained sovereignty. *United States v. Wheeler,* 435 U.S. at 313, 323, 328 (1978). In determining the boundary of a tribe's authority, its retained sovereignty must be examined against the backdrop of Congressional action and intent. *Santa Clara Pueblo,* 436 U.S. at 60; *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 172 (1973); *White Mountain Apache,* 448 U.S. at 143; *National Farmers Union,* 85 L.Ed.2d at 826.

The history of retained civil tribal power and Congressional action indicates tribes do retain significant and extensive civil powers over disputes affecting important personal property rights of both Indians and non-Indians arising on the reservation. *Santa Clara Pueblo v. Martinez,* 436 U.S. at 65; *Williams v. Lee,* 358 U.S. 217 (1959); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. at 137; *Fisher v. Dist. Ct.,* 424 U.S. at 386-7; see also *Ken-*

nerly v. District Court, 400 U.S. at 423 (1971). A long history of administrative and judicial decisions recognize broad retained civil tribal jurisdiction.

The Executive Branch of the Federal Government has acted on the assumption that Indian tribes may subject non-Indians to civil jurisdiction, at least since the mid-nineteenth century. 7 Op. Att'y Gen. 174 (1855); see also 23 Op. Att'y Gen. 214 (1900), Op. Sol. Int., Oct. 13, 1976. For example, in 1855, Attorney General Cushings concluded that civil jurisdiction remains subject to the local jurisdiction of the tribes. Indicating that Congress had the right to legislate in that regard, he nevertheless wrote:

> "[Congress] has legislated, insofar as it saw fit, by taking jurisdiction in criminal matters, and omitting to take jurisdiction in civil matters. . . By all possible rules of construction the inference is clear that the jurisdiction is left to the Chocktaws themselves of civil controversies arising strictly within the Chocktaw Nation." 7 Op. Att'y Gen. 175, 179-181 (1955) cited in *National Farmers Union,* 85 L.Ed.2d at 826.

As noted above, this Court recognized that Tribes retained self-government powers from early in the nineteenth century. *Worcester* (1832); *Crow Dog,* (1883). Congress reacted to some of these decisions by taking jurisdiction of certain criminal matters. For example, in reaction to *Crow Dog,* Congress passed legislation making certain major crimes committed by Indians to be federal offenses. 18 U.S.C. § 1153, 3242 (1967); see *National Farmers Union,* 85 L.Ed. at 825-826; see generally, *Felix S. Cohen's Handbook of Federal Indian Law* 253 (1982) [hereinafter cited as *Cohen*].

However, Congress has never passed similar legislation granting federal courts jurisdiction over civil disputes arising on the reservation. *National Farmers Union,* 85 L.Ed.2d at 826. In fact, when Congress has spoken on the subject, it has repeatedly promoted the policy of encouraging tribal self-government. This policy, under the leadership of Presidents from both parties during the last three decades, found expression in a variety of legislation, (See *White Mountain Apache Tribe,* 448 U.S. at 143 n.10; see generally, *Cohen,* Ch. 2. § F2g (1982).) Examples of the legislation include the following.

In 1968 Congress enacted the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1341 (1968). Among other things, that Act strengthened tribal courts through training of Indian judges, minimizing interference by the Federal Bureau of Indian Affairs in tribal litigation, and requiring tribal consent before permitting a state to take jurisdiction over private civil claims arising on the reservation. *Santa Clara Pueblo,* 436 U.S. at 64. The Act also authorized the United States to accept retrocession of all or part of the criminal or civil jurisdiction acquired by a state under previous Public Law 280. See 25 U.S.C. §§ 1321-26 (1968), 28 U.S.C. § 1360 (1953); see generally, *Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians,* 22 UCLA L. Rev. 535 (1975), *Cohen,* Ch. 2, § F2f (1982).

Other significant legislation included the Indian Self-Determination and the Indian Education Assistance Act of 1975. 25 U.S.C. § 450-450n, 455 (1975). In the former Act, the Congress declared a Congressional commitment to:

> [Maintain] the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy, which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. 25 U.S.C. § 450a(a) (1975).

The Tribal Jurisdiction Act of 1976 granted tribes the right to bring actions in federal courts in cases in which the United States Attorney had declined to act. That Act thereby allowed tribes to protect their interests free of limitations otherwise existing for private litigants. 28 U.S.C. § 1362 (1962). See, e.g., *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 474 (1976).

Also, Congress recently passed a joint resolution designed to protect the social and cultural integrity of Indian people by insuring the policies and procedures of various federal agencies, as they impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging free exercise of religion. 42 U.S.C. § 1996 (1978). See also, H.Rep. No. 1308, 95th Congress, Second Session, 1, (reprinted in 1978), U.S. Code Cong. & Ad. News, 1262, 1263.

In 1974 Congress enacted the Indian Financing Act. The stated goal of that Act was to:

> [provide] capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources. 25 U.S.C. § 1451 (1974). See 25 U.S.C. §§ 1451-53, 1461-69, and 1481-98 (1974).

Thus, Congress has *not* passed legislation which limits the tribes' civil jurisdiction. It has, however, passed considerable legislation promoting the policy of tribal self-government and self-determination. This is the backdrop by which the Congressional intent regarding diversity statutes must be examined.

In recent decisions this Court has recognized the Congressional policy of Indian Self-Government and Self-Determination. In *Fisher,* 424 U.S. at 387, the Supreme Court recognized that the Indian Reorganization Act, 25 U.S.C. § 476 (1970), was specifically intended to encourage Indian tribes to revitalize their self-government. In *Santa Clara Pueblo,* 436 U.S. at 64, the Court observed that the Indian Civil Rights Act manifested a congressional purpose to protect tribal sovereignty and strengthen the Tribal Court systems. See also, *U.S. v. Wheeler,* 435 U.S. at 327. In *White Mountain Apache Tribes,* 448 U.S. at 143, the Court noted a number of Congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.

The Court has, therefore, upheld broad Indian civil authority to regulate and control important personal and property interests of both Indians and non-Indians arising on the reservation. In *Williams v. Lee,* the Supreme Court held the tribal court had exclusive jurisdiction to adjudicate a civil dispute arising on the reservation. The civil dispute arose from a debt incurred by an Indian to the non-Indian merchant on the reservation. The Court held that it was immaterial that the merchant was not an Indian. He was on the reservation and the transaction with the Indian took place there.

More recently, *Kennerly v. District Court,* 400 U.S. 423 (1971) involved essentially the same facts as *Williams.* A debt by an Indian to a non-Indian arose on the reservation. Despite ordinances by the Blackfeet Tribal Council attempting to grant jurisdiction to the state, the state courts had no jurisdiction over the action. The proper jurisdiction was in the tribal court.

In *Fisher v. District Court,* 424 U.S. 382 (1976) the state courts of Montana attempted to assert jurisdiction over a child welfare case in which both the parents and the child were Indians residing on the reservation. The Court held that the state courts did not have jurisdiction over the action because such jurisdiction would infringe upon tribal self-government. Therefore, the exclusive jurisdiction was in the tribal court.

In *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982) the Supreme Court held that a severance tax imposed on oil and gas removed from the Indian reservation by non-Indians was proper. It held that such power of the tribe was inherent in its sovereign authority to control economic activities on the reservation. 455 U.S. at 127. See also *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134 (1980).

As a corollary to this sovereign power, the Supreme Court has recognized that Indian tribes and individuals are generally exempt from state taxation within their own territories. *Montana v. Blackfeet Tribe of Indians,* 471 U.S. —, 85 L.Ed.2d 753 (1985).

It is true that the Supreme Court has recognized that the civil power of tribes is not unlimited. Where no important tribal interests are directly affected, the tribe

may not be able to regulate non-Indians on non-Indian lands even if the conduct occurs within the reservation boundaries. For example, in *Montana v. United States,* 450 U.S. 544 (1981), the Court held that the Crow Tribe lacked inherent civil authority to regulate fishing by non-Indians on non-Indian lands within the reservation boundaries when no important tribal interests were affected. However, the Court in *Montana* nevertheless pointed out that Indian tribes retain inherent sovereign power to exercise civil jurisdiction over non-Indians who enter consensual relationships with the tribe or its members through commercial dealings, contracts, leases or other arrangements. 450 U.S. at 565. The Court further indicated the tribe retained inherent power to exercise civil authority over the conduct of non-Indians when that conduct has a direct effect on the tribe's political, economic or health and welfare. 450 U.S. at 566. Thus, it is clear that when the tribe or its members' interests are affected, the tribe retains extensive civil jurisdiction over civil disputes involving tribal territory, tribal members or tribal government.

B. MONTANA STATE COURTS DO NOT HAVE JURISDICTION OF THE PRESENT CASE

Montana state courts do not have jurisdiction in this case. The tribal court properly has jurisdiction over the present action. The dispute involves a commercial transaction with Blackfeet Indians to insure people and property involved in a business located on the reservation. The basis of the present controversy is a traffic accident which occurred on the Blackfeet Indian Reservation. All of the named Defendants are enrolled members of the

Blackfeet Indian Tribe. Iowa Mutual voluntarily availed itself of business opportunities on the reservation with Blackfeet Indians.

The district court, therefore, correctly held that the dispute arose on the reservation. App. to Pet., pp. 12-27. The underlying personal injury and bad faith actions are presently pending in the Blackfeet Court. In that forum, motions to resolve the present dispute are pending before the Tribal Court.

In the present action, Petitioner, Iowa Mutual, has not argued that a State Court has jurisdiction. However, it claims the state or tribal jurisdiction should not impact on the resolution of the diversity jurisdictional issue. (Brief for Petitioner at 12). In its brief to the Ninth Circuit, Iowa Mutual admitted Montana state courts would not have jurisdiction over all or some of the Defendants. (Brief for Appellant in 9th Circuit p. 5). In argument below, Iowa Mutual has also admitted that the District Court properly applied the case of *R.J. Williams Company v. Fort Belknap Housing Authority,* 719 F.2d 979 (9th Cir. 1983), (see App. to Pet., p. 5a). The *R.J. Williams* case involves a business transaction arising on the reservation. The Ninth Circuit held that the federal courts are divested of diversity jurisdiction whenever the dispute involves exercise of a tribe's responsibility for self-government. *Id.* Iowa Mutual has not attempted to distinguish *R.J. Williams.* Rather, it asked the Ninth Circuit, and now this Court, to overrule that case, to allow diversity jurisdiction *despite* the fact that the state court does not have jurisdiction.

Thus, the tribe's jurisdiction of the present dispute does not appear to be at issue. However, Respondents

address the issue here because Iowa Mutual, in its Brief to the U.S. Supreme Court, incorrectly implies that it had no activities on the reservation. It appears to attempt to indicate that Iowa Mutual did nothing more than approve an application by the Wellmans, which was made off the reservation. This statement is not correct. While it is true that Iowa Mutual's agent's office is off the reservation, the commercial relationship has existed with the Wellmans for many years. It was necessary in the application process and the ongoing business relationship for Iowa Mutual's agents to enter the reservation to photograph and inventory a large ranching business. Naturally, Iowa Mutual also accepted premium payments. Subsequently, Iowa Mutual's agents have regularly been back on the reservation in this commercial relationship. Further, there is no question that Iowa Mutual's agents went onto the reservation to adjust the underlying personal injury claim. It is clear Iowa Mutual voluntarily availed itself of transacting insurance business with Blackfeet Indians on the Blackfeet Reservation. Thus, while it does not appear to be a substantial issue in this case, it is, nevertheless, clear that the State Court would not have jurisdiction and the Tribal Court properly has jurisdiction.

C. ALLOWING DIVERSITY JURISDICTION IN THE PRESENT CASE WOULD SUBSTANTIALLY INTERFERE WITH TRIBAL SELF-GOVERNMENT

Diversity jurisdiction would substantially interfere with tribal self-government. Providing a federal forum, when the state court does not have jurisdiction, would in-

terfere with tribal autonomy and self-government. Not only would it interfere with the Tribal Court proceedings presently pending in the present case, and undermine the authority of tribal court institutions, but it would also interfere with the application of substantive Tribal Law.

Petitioner admits that the state court would not have jurisdiction in this case. The reason a state court would not have jurisdiction was articulated in *Williams*. It stated that the "question has always been whether the state action would infringe on the right of reservation Indians to make their own laws and be ruled by them." 358 US at 220. It reasoned:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of tribal courts over Reservation affairs and hence would infringe on the rights of Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the reservation and the transaction with an Indian took place there. . . [Citations omitted]. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. 358 U.S. at 223.

Petitioner makes several arguments why diversity jurisdiction as opposed to state jurisdiction, would not interfere with the tribal self-government. It argues that since diversity cases involve out-of-state parties, the actions would not be "typical debt collection cases" found in *Williams and Kennerly*. The Petitioner recites no authority for its broad statement. In point of fact, one can think of innumerable out-of-state parties who could bring debt collection type actions, which could qualify under diversity cases. Large diversified corporations operate and do business in towns and cities on reservations just as they do

in every other area of the United States. Auto financing companies, mortgage companies and insurance companies are just a few parties who could generally readily avail themselves of diversity jurisdiction. Beyond that, however, it does not seem logical that interference with a typical debt collection case is any more palatable than interference with any other civil action which would otherwise qualify for diversity action. If anything, the tribe and its members would have more interest in resolving the larger scale civil suits involving over $10,000.00.

Petitioner also argues that diversity jurisdiction would not negatively impact on tribal court systems because diversity jurisdiction cases would generally involve controversies that would fall outside the jurisdiction of tribal courts. This argument is unpersuasive because it avoids the issue before the Court. If the tribal court does not have jurisdiction, then presumably the state courts and federal courts, if other jurisdictional requirements are present, would *have* jurisdiction. Of course, the acceptance of such jurisdiction would, in that case, not interfere with tribal self-government because the tribal court never had jurisdiction.

However, this is not the issue to be resolved in this case. The Petitioner has admitted that Montana state court does not have jurisdiction in the present case. The issue is whether, this being true, the federal court should take diversity jurisdiction, and infringe on tribal court jurisdiction where a state court could not.

The Petitioner's arguments that diversity jurisdiction would not interfere with tribal self-government are not substantial. The position that private action, otherwise

not maintainable in state courts, should be allowed in diversity cases because they do not interfere with tribal self-government has been severely criticized by commentators as "clearly wrong." *Cohen,* 317 (1982). It would seem inconsistent to hold that state court jurisdiction of such actions would interfere with tribal self-government while federal court jurisdiction would not. The same interference is taking place except in a different forum.

The Supreme Court has recognized that a federal forum is just as disruptive of tribal self-government as state. In *Santa Clara Pueblo,* the Court noted that providing the federal forum for issues arising under 25 U.S.C. § 1302 (1968) (hereinafter cited as ICRA) constitutes an interference with tribal autonomy and self-government. It observed that resolution of a dispute in a foreign forum "cannot help but unsettle a tribal government's ability to maintain authority." 436 U.S. at 60. It stated:

> In addressing this inquiry, we must bear in mind that providing a federal forum for issues arising under § 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself. Even in matters involving commercial and domestic relations, we have recognized that "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves," *Fisher v. District Court,* 424 U.S. 382, 387-388 (1976), may "undermine the authority of the tribal court . . . and hence . . . infringe on the right of the Indians to govern themselves. *Williams v. Lee,* 358 U.S. at 223. 436 U.S. at 59.

This reasoning of the U.S. Supreme Court in *Santa Clara Pueblo* is sound. The interference with tribal court proceedings is readily apparent in the present case. The

original action was filed in tribal court. Motions are presently pending, which would resolve the dispute filed by Iowa Mutual. By granting diversity jurisdiction, the federal court would effectively deny the tribal court the authority to resolve a dispute which is properly before it, or even to determine its own jurisdiction to decide the issue. See *National Farmers Union,* 85 L.Ed.2d at 827. At the very least, the diversity action would create a substantial risk of conflicting adjudications, causing a corresponding decline in the authority of the Tribal Court. See *Fisher,* 424 U.S. at 388.

Beyond the interference with the tribal court's proceedings, however, granting of diversity jurisdiction also interferes with the application of tribal substantive law. If a cause of action arises on the reservation, the general principles of conflicts of law would dictate that the substantive law of the tribes should be applied even if the case is litigated elsewhere. See generally, *Restatement (Second) of Conflicts of Law,* § 6, Comment C, D, F, G, and I, § 10, Comments b & c, § 145, § 188 (1971). However, the Rules of Decision Act, 28 U.S.C., § 1625 (as interpreted in *Erie,*) would appear to indicate that the federal district court should apply the rules of the law of the state in which it sits. If the state law is applied, then state law would apply only to cases where diversity lies. Tribal law would apply to all other cases in which the state court does not have jurisdiction and the tribal court does. This asymmetrical result would violate the spirit of *Erie* with regard to the equal protection of the law for both Indians and non-Indians as well as encourage forum shopping. See *Erie,* 304 U.S. at 74-75. Intense jurisdictional battles would occur if the tribal court substantive

law is different than the state courts. See generally, Grover, *Jurisdiction: Conflicts of Law and the Indian Reservation: Solutions to Problems in Indian Civil Jurisdiction,* 8 Am. Indian L. Rev. 361 (1980); Canby, Jr., *Civil Jurisdiction and the Indian Reservation* (1973), Utah L. Rev. 206.

Even if federal courts did attempt to apply tribal law, it would be difficult for them to do so because of their unfamiliarity with tribal customs and traditions. In *Santa Clara Pueblo,* the U.S. Supreme Court observed that there may be great differences between tribal traditions and those with which the federal courts are more familiar. For this reason, the Court stated, the judiciary should not rush to create federal causes of action on these delicate matters. 436 U.S. at 72 n.32. See also, *U.S. v. Wheeler,* 435 U.S. at 331-32.

Finally, providing a federal forum in diversity would not only undermine the tribal institutions and substantive law, but it would also impose serious financial burdens on the already "financially disadvantaged" tribes. The cost of civil litigation in Federal Courts, in many instances located far from the reservations, doubtless exceeds that in most tribal forums. *Santa Clara Pueblo,* 436 U.S. at 64-65, n.19.

Thus, the Petitioner's argument that the providing of the foreign forum would not interfere with Indian self-government has no merit. A foreign forum would interfere in the tribal court's authority to resolve disputes arising on the reservations as well as with the application of the substantive law of the tribe.

D. CONGRESS DID NOT INTEND THE DIVERSITY STATUTE TO PROVIDE A FORUM WHICH WOULD INFRINGE ON THE TRIBE'S ABILITY TO GOVERN ITSELF

There is absolutely no evidence that Congress intended the general diversity jurisdiction statute to infringe on the tribe's ability to self-govern. On the contrary, the evidence appears clear that Congress did not intend the diversity statute to apply when state courts would not have jurisdiction.

The diversity of state citizen statute is the oldest general jurisdiction of federal courts over private actions. (*Act of September 24, 1789,* Ch. 20, §§ 11, 12, 1 Stat. 73, 78.) (codified and carried forward at 28 U.S.C. § 1332). There is no indication that Congress intended this ancient statute to invade tribal self-government. On the contrary, as discussed above, Congress has passed a myriad of legislation expressing its policy of promoting tribal self-government. Of particular importance is 25 U.S.C. §§ 1321-1326, which specifically require tribal consent by popular referendum before a state can assume jurisdiction over civil actions arising on the reservation. The policy of this statute is to promote Indian tribal self-government by allowing tribes to make their own laws and be governed by them. There is no evidence that Congress intended diversity jurisdiction to be a means by which to avoid the policy of this statute. See generally, *Cohen,* 317, n.291 (1982).

The rules of statutory construction support this position. As recently discussed by this Court, the "canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and

Indians." *Montana v. Blackfeet,* 85 L.Ed.2d at 759. Ambiguities or doubts in statutes must be construed in favor of Indians. *Montana v. Blackfeet,* 85 L.Ed.2d at 759. When interpreting statutes which may have the effect of infringing on tribal self-government, these statutes must be strictly construed. See generally, *Cohen,* 224 (1982).

These principles have been recently applied by this Court in *Santa Clara Pueblo.* In that case, an Indian woman brought an action in federal court seeking a declaration that an ordinance denying membership to children or female tribal members was invalid under the Indian Civil Rights Act. Although the court observed that it had frequently recognized the "propriety of inferring a federal cause of action for the enforcement of civil rights", 436 U.S. at 61, it nevertheless indicated that the applicable federal statute must be read in light of the backdrop of Indian sovereignty and Congressional intent to promote tribal self-government. 436 U.S. at 60. The Court noted that creating a federal cause of action would plainly be at odds with the Congressional goal of protecting tribal self-government. 436 U.S. at 64. It stated that the Supreme Court had repeatedly recognized that the tribal courts were appropriate forums for exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians, 436 U.S. at 65, and that providing a federal forum would necessarily constitute interference with the tribal autonomy and self-government, 436 U.S. at 59. The Court, therefore, strictly construed the Indian Civil Rights Act to provide a federal forum only in cases of habeas corpus. The court refused to recognize a general declaratory cause of action,

in federal court, for the enforcement of the civil rights articulated by the Act.

Similarly, in *Kennerly,* this Court strictly construed the necessary requirements by which a state could assume civil jurisdiction of disputes arising on the reservation under 25 U.S.C. §§ 1321-1326 (1968). In that case, although the tribe, by ordinance, had attempted to grant concurrent jurisdiction to the state, the Court held that the state court had no jurisdiction because the state legislature had failed to pass affirmative legislation with respect to jurisdiction over that reservation and the tribe had not put the issue to a vote of the adult enrolled Indians.

Thus, when construing legislation which provides state or federal forums, which could infringe upon tribal self-government, this Court has construed the statutes narrowly against the assumption of state or federal jurisdiction. See also *Bryan v. Itasca County,* 426 U.S. 373 (1976).

Even where this Court has recognized a federal cause of action, it has deferred to the Tribal Court, at least in the first instance, to determine its own jurisdiction. In *National Farmers Union,* the Supreme Court recognized a federal cause of action under 28 U.S.C. § 1331, to determine whether or not a tribal court had exceeded its jurisdiction. The Court, nevertheless, held that an exhaustion of tribal remedies is first necessary before the claims could be entertained by the Federal District Court.

These rules of construction, which disfavor federal or state intrusion into tribal civil jurisdiction, are especially compelling in light of the traditional view of interpreting the diversity jurisdiction statute strictly and nar-

rowly. See *Thomson v. Gaskill,* 315 U.S. 442 (1942); *City of Indianapolis v. Chase Nat'l Bank,* 314 U.S. 63 (1941).

Further, Congress's failure to address the conflicts of law problem, discussed above, is also strong evidence that it did not intend the general diversity statute to apply, when state courts would not have jurisdiction. See *Cohen,* 317-318, n.291 (1982). Thus, the evidence as a whole, clearly indicates that Congress did not intend the general diversity statute to be used to infringe on tribal self-government.

E. THE RATIONALE OF WOODS AND ERIE IS APPLICABLE TO THE PRESENT CASE

The rationale of *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938) and *Woods v. Interstate Realty Co.,* 337 U.S. 535 (1949) is applicable to the present case. The Ninth Circuit correctly used the rationale as a partial basis for the denial of diversity jurisdiction when state courts would not have jurisdiction.

Petitioner, Iowa Mutual, argues that the *Erie* doctrine does not serve as an adequate justification for the refusal to exercise diversity jurisdiction. Its argument is based on its interpretation of the *Erie* lines of cases as being a means to "foster uniformity in the development of state laws." (Petitioner's Opening Brief, p. 7). While it is true that the *Erie* and *Woods* cases were based, in part, on the need to foster uniformity of development of state laws, they were also based on equally important policies of avoiding forum shopping and unequal protection of the laws to citizens of the forum state. These latter policies are clearly applicable to the present case. Iowa Mutual, however, fails to address them.

The policies of preventing forum shopping and unequal protection of laws were clearly a concern of the Court in the cases of *Erie* and *Woods. Erie* involved the issue of whether state law or federal common law applied to the liability of a railroad company for the injury caused by the negligent operation of its train to a pedestrian on a pathway on the railroad company's right-of-way. Prior to *Erie,* the Supreme Court had held that federal courts exercising jurisdiction on the grounds of diversity need not, in matters of general jurisprudence, apply the unwritten law of the state, as declared by its highest court. 304 U.S. at 71. Justice Brandeis, speaking for the Court, however, noted that this prior rule produced a number of "mischievous results." 304 U.S. at 74. The mischievous results which were of most concern were that the rule rendered equal protection of the law impossible and promoted forum shopping. He wrote:

> . . . The mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent the apprehended discrimination in state courts against those not citizens of the State. *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the rights should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. 304 U.S. 74-75.
>
> . . .

> In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizen jurisdiction. Through this jurisdiction individual citizens willing to remove from their own state and become citizens of another might avail themselves of the federal rule. And, without even change of residence, a corporate citizen of the State could avail itself of the federal rule by re-incorporating under the laws of another State, . . . 304 U.S. 76-77.

The Supreme Court's concern for unequal protection of the law and forum shopping was also noted in *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949). In that case, a foreign corporation transacting business in the State of Mississippi without qualifying to do business, could not maintain a suit in federal court upon contracts entered into in such state, when such contracts would be unenforceable in state court. The Court observed that where a local citizen could not bring an action in state court, allowing an out-of-state citizen to bring a diversity action would discriminate against citizens of the state. The Court stated:

> [Prior authority requiring federal courts in a diversity case to apply state law] was premised on the theory that a right which local law creates but which it does not supply with a remedy is no right at all for purposes of an enforcement in a federal court in a diversity case; that where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court. The contrary result would create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that *Erie R. Co. v. Tompkins* was designed to eliminate. 337 U.S. at 538.

In the present case, the permitting of diversity jurisdiction, when a state court would not have jurisdiction, would promote the mischiefs of unequal protection of the laws and forum shopping discussed in *Erie* and *Woods*. Most tribal codes are patterned after federal regulations. 25 C.F.R. § 11.23 (1985). Often they require tribal courts to apply: (1) federal law, federal regulations, and ordinances or customs of the tribe not prohibited by federal law; and (2) in matters not covered by (1), the law of state in which the matter in dispute may lie. See generally, *Canby,* supra, at 216. Thus, tribal custom could have a sizeable effect on civil litigation. Indian customs and traditions may dictate different approaches than that which the state may use. *Chino v. Chino,* 90 N.M. 204, 206, 561 P.2d 476, 479 (1977).

As discussed above, it is questionable whether federal district courts would apply the state law or attempt to apply tribal custom. Even if they would attempt to apply the latter, it may be extremely difficult for them to do so in light of their limited experience in tribal customs and law, as opposed to state statutory and reported law. See *Santa Clara Pueblo,* 436 U.S. at 72, n.32. In this case, by permitting a foreign party to bring an action in a federal forum, when state court would not have jurisdiction, would discriminate against the citizen of Montana as well as promote intense jurisdictional battles. A citizen of the State of Montana would be required to bring the present action in tribal court, inasmuch as the Petitioner has admitted the state courts do not have jurisdiction. It would be incongruous to permit an out-of-state party to bring a diversity action in order to avoid the tribal court forum and to circumvent tribal substantive law when a state

citizen would be unable to do so. The rationale of *Woods* and *Erie* is therefore applicable to the present case. A federal court, sitting in diversity, should not have jurisdiction over a reservation Indian, when state court would not have similar jurisdiction.

F. THE EIGHTH CIRCUIT APPEARS TO BE BACKING AWAY FROM ITS POSITION IN POITRA

The Petitioner applied for a Certiorari in this case to resolve a conflict between the Ninth and Eighth Circuits. For the reasons discussed above the Respondents have taken the position that the Ninth Circuit holdings are correct on the matter. In addition to these reasons, however, it should be noted that there is good evidence that the Eighth Circuit is retreating from its position taken in *Poitra v. Demarrias*, 502 F.2d 23 (8th Cir. 1974), cert. denied 421 U.S. 934 (1975).

In the very recent case of *Weeks Construction v. Oglala Sioux Housing Authority*, — F.2d — (8th Circuit No. 85-5129 and 85-5130, filed July 29, 1986), the Eighth Circuit was presented with a factual situation very similar to *R.J. Williams*. Both cases involved a construction company contracting to perform work for a tribal housing authority on reservations. Disputes arose between the construction companies and the housing authorities. The construction companies filed suit in federal district court, based upon diversity, to resolve the disputes.

As discussed above, the Ninth Circuit in *R.J. Williams* denied diversity jurisdiction on the grounds that diversity jurisdiction would infringe on tribal self-government and that the policy of *Erie v. Tompkins* and *Woods* do not permit a federal district court to take diversity where a state court does not have jurisdiction.

Interestingly enough, the Eighth Circuit, in *Weeks*, also declined to accept diversity jurisdiction, apparently for the same reasons. The Court noted the unique legal status of Indians and Indian tribes requires consideration of Indian sovereignty as a backdrop against which federal jurisdiction statutes must be read. *Weeks* Slip Opinion at 7. The Court also noted that this fundamental premise is applicable to federal courts as well as state courts absent governing acts of Congress. *Weeks* Slip Opinion at 9. The Court held that in light of this policy the assertion of diversity jurisdiction by a non-Indian against the Indian housing authority would constitute an infringement on tribal self-government. *Weeks* Slip Opinion at 10, n.7. In so ruling the Court specifically cited the case of *R.J. Williams* as authority. *Weeks* Slip Opinion at 7, 8, 9, 10, n.7.

It is also of interest to note that the Eighth Circuit cited *Woods* for the proposition that a federal court has original jurisdiction over civil actions, if the parties are of diverse state citizenship and *the Courts of the state in which the federal court sits can entertain a suit. Weeks* Slip Opinion at 7. In *Weeks*, neither party maintained that the dispute could be brought in South Dakota state court. *Weeks* Slip Opinion at 7, n.4.

Finally, the Court in *Weeks* specifically recognized, without rejecting, the criticism of commentators indicating that its position in *Poitra* was clearly wrong. *Weeks* Slip Opinion at 10, n.7. Although the Court indicated it need not discuss *Poitra's* correctness in that case, it would ap-

pear that the ruling in *Weeks* severely undercut the holding of *Poitra,* if it did not completely overrule it.

Thus, inasmuch as the Petitioners have agreed that the Ninth Circuit case of *R.J. Williams* was controlling in the present case, (App. to Pet., p. 5a) the Eighth Circuit's holding in the almost factually identical case of *Weeks* would indicate that there is no conflict between the Eighth Circuit's position the Ninth Circuit should be affirmed in the present case.

———o———

V. CONCLUSION

A federal district court does not have diversity jurisdiction over a case involving Indians and arising on the reservation, when a state court would not have such jurisdiction. In light of the history of tribal civil jurisdiction, Congress's policy of promoting tribal self-government, and the policies articulated by *Erie,* Congress did not intend for the diversity statute to infringe on tribal self-government. The Ninth Circuit Court of Appeals should be affirmed.

DATED this 25th day of August, 1986.

/s/ Joe Bottomly
P.O. Box A
Great Falls, Montana 59403
Attorney for Edward M. LaPlante
and Verla LaPlante

No. 85-1589

IN THE

Supreme Court of the United States

October Term, 1985

IOWA MUTUAL INSURANCE COMPANY,
a corporation,

Petitioner,

vs.

EDWARD M. LaPLANTE, VERLA LaPLANTE,
ROBERT WELLMAN, JR., RAMONA WELLMAN,
CRAIG WELLMAN, TERRY WELLMAN and
WELLMAN RANCH COMPANY
a dissolved Montana corporation,

Respondents.

PETITIONER'S REPLY BRIEF

MAXON R. DAVIS
CURE, BORER & DAVIS
320 First National Bank Building
P. O. Box 2103
Great Falls, Montana 59403
Telephone: (406) 761-5243

No. 85-1589

IN THE

Supreme Court of the United States

October Term, 1985

IOWA MUTUAL INSURANCE COMPANY,
a corporation,

Petitioner,

vs.

EDWARD M. LaPLANTE, VERLA LaPLANTE, ROBERT WELLMAN, JR., RAMONA WELLMAN, CRAIG WELLMAN, TERRY WELLMAN and WELLMAN RANCH COMPANY
a dissolved Montana corporation,

Respondents.

PETITIONER'S REPLY BRIEF

MAXON R. DAVIS
CURE, BORER & DAVIS
320 First National Bank Building
P. O. Box 2103
Great Falls, Montana 59403
Telephone: (406) 761-5243

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii-iii

ARGUMENT:

I. This action does not infringe upon retained tribal sovereignty 1

II. The *Erie* doctrine is not offended by the exercise of diversity jurisdiction in cases involving reservation Indians 4

III. Allowance of diversity claims against reservation Indians is consistent with federal Indian policy 8

IV. There is no need for any further evidence of congressional intent to bring reservation Indians within the scope of the diversity statute..... 11

V. The *Weeks* case has not obviated the problem now before this court 12

VI. Conclusion 13

TABLE OF AUTHORITIES

CASES:

Burton vs. United States Olympic Committee, 574 F. Supp. 517 (C.D. Cal. 1983) 13

Erie R.R. vs. Tompkins, 304 U.S. 64 (1938) 4, 8, 12

Fisher vs. District Court, 424 U.S. 382(1976) ... 3, 8

Kennerly vs. District Court, 400 U.S. 423 (1971) 3, 7, 9

Liberty Warehouse Co. vs. Grannis, 273 U.S. 70 (1927) 1

Merrion vs. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 6, 7

Montana vs. United States, 450 U.S. 544 (1981) 3, 6, 7

National Farmers Union Ins. Co. vs. Crow Tribe of Indians, et al, 471 U.S. ____, 85 L.Ed.2d 818 (1985) 4, 9, 10

Oliphant vs. Suquamish Indian Tribe, 435 U.S. 191 (1978) 7

Poitra vs. Demarrias, 502 F.2d 23 (8th Cir 1974), cert. den'd. 421 U.S. 934 (1975) 12

R. C. Hedreen Co. vs. Crow Tribal Housing Authority, 521 F.Supp. 599 (D.Mont. 1981) 13

R. J. Williams Co. vs. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983), cert. den'd. ____U.S.____, 87 L. Ed.2d 612 (1985) 12

CASES (continued): Page

Santa Clara Pueblo vs. Martinez, 436 U.S. 49 (1978) 8

Skelly Oil Co. vs. Phillips Petroleum, 339 U.S. 667 (1950) 1

Three Affiliated Tribes vs. Wold Engineering, ____U.S.____, 90 L.Ed.2d 881 (1986) 2, 9, 11

United States vs. Dion, ____U.S.____, 90 L.Ed.2d 767 (1986) 4, 12

United States vs. Wheeler, 435 U.S. 313 (1978) 2, 7

Weeks Construction Inc. vs. Oglala Sioux Housing Authority, 797 F.2d 668 (8th Cir. 1986) 12, 13

Williams vs. Lee, 358 U.S. 217 (1959) 2, 4, 7, 12

Woods vs. Interstate Realty Co., 337 U.S. 535 (1949) 4

UNITED STATES CODE AND RULES:

Rules of Decision Act, 28 U.S.C. 1652 4
Public Law 280 9
8 U.S.C. Sec. 1401(a)(2) 12, 13
28 U.S.C. Sec. 1332 ..... 4, 12, 13
28 U.S.C. Sec. 2201 ..... 1, 10
Rule 8(b), Fed. Rules of Civil Procedure 1

MISCELLANEOUS AUTHORITIES:

Blackfeet Law and Order Code, Chp.2, Sec. 2. 5
Constitution of the Blackfeet Tribe of the Blackfeet Reservation, Art. VI, Sec. 1 7

ARGUMENT

I. THIS ACTION DOES NOT INFRINGE UPON RETAINED TRIBAL SOVEREIGNTY

The respondents and amici tribes argue that since this litigation involves reservation Indians, it can proceed nowhere but in tribal court. To permit otherwise would infringe on the jurisdiction of the tribal courts. The tribes even argue that the infringement doctrine precludes federal (or state) jurisdiction over almost any reservation related claim, even if the tribal court itself could not hear the case. (See Brief of Amicus Curiae Blackfeet Tribe of Indians at page 19 and Brief of Amici Curiae Navajo Nation et al at page 25.)

This entire line of argument is unsound. As the briefs of the amici demonstrate, the argument leads to an incongruous result. All manner of Indian-related litigation and all species of litigants would lack a forum, since federal and state courts would be divested of jurisdiction over them, even though tribal courts might not be invested with that same jurisdiction. This case is a perfect example. Iowa Mutual filed an action for a declaration of its rights pursuant to 28 U.S.C., Sec. 2201. The Blackfeet Law and Order Code contains no authorization for its tribal court to hear comparable disputes.[1] One questions what perceived aspect of federal Indian policy is being furthered by such a state of affairs, particularly in light of this court's own recent recognition of the "weighty" federal

---

[1]Amici note that Iowa Mutual raised its lack of coverage as an affirmative defense in the tribal court action. They are correct. Common notions of pleading (which notions we can only assume apply in the Blackfeet Tribal Court) require nothing less. See Rule 8(b), Fed. Rules of Civil Procedure. Iowa Mutual's raising of an affirmative defense can, under no circumstances, be viewed as investing the tribal court with the power granted federal courts under 28 U.S.C., Sec. 2201. Compare Skelly Oil Co. vs. Phillips Petroleum Co., 339 U.S. 667 (1950) with Liberty Warehouse Co. vs. Grannis, 273 U.S. 70 (1927).

interest that all citizens have access to the courts. Three Affiliated Tribes vs. Wold Engineering, ____ U.S. ____, 90 L. Ed. 2d 881, 892 (1986). That interest is totally frustrated if the access in question is only to a court which has not been empowered to resolve the matter in controversy between the litigants.

Apart from the patently unfair result to which respondents' and amici's infringement argument leads, there is the equal, if not greater, problem, that the argument stems from a faulty premise.

To our opponents, infringement is an outgrowth of the concept of retained tribal sovereignty. To whatever extent that concept may have been a factor in Williams vs. Lee, 358 U.S. 217 (1959), it is clear that this court has now moved beyond retained sovereignty as a justification for its Indian law decisions. Since *Williams*, this court has stated that retained sovereignty is "of a unique and limited character." United States vs. Wheeler, 435 U.S. 313, 323 (1978). It is limited primarily to *internal affairs;* there has been an implicit divestiture of sovereignty involving the relations between an Indian tribe and non-members. *Id.* at page 326. The trend has been *away* from retained sovereignty *to* the idea of federal pre-emption. Three Affiliated Tribes vs. Wold Engineering, *supra* at page 889.

With the concept of federal pre-emption as the context within which this case is to be decided, the issue at hand reduces itself to the following question:

> Does the federal pre-emption doctrine divest federal courts of federal jurisdication over Indian-related claims?

Or, even more simply:

> Have the federal courts pre-empted themselves of Congessionally mandated jurisdiction?

We think not.

Iowa Mutual finds it amusing that the amici can present extensive arguments about the interplay between tribal and federal (or state) civil jurisdication without any reference to perhaps this court's most detailed recent analysis of the subject, Montana vs. United States, 450 U.S. 544 (1981). Their omission is telling, as is the respondents' passing reference (respondents' Brief at p. 13) to *Montana* as a case supportive of their position.

To the contrary, when this court demonstrated in *Montana* the application of principles drawn from reservation criminal cases to the civil law area, the meaning was clear. The infringement doctrine, on which cases such as *Williams, Kennerly*[2] and *Fisher*[3] rest, is an outgrowth of the federal pre-emption doctrine, not a manifestation of retained tribal sovereignty. In other words, the right of reservation Indians to "make their own laws and be ruled by them," as announced in *Williams* (358 U.S. at 254), is the right to make their own laws and be ruled by them because the federal government has pre-empted state governments from doing so. The federal government has, however, not pre-empted itself. Indeed, according to this court in *Montana,* it is the tribes themselves which are pre-empted:

> "Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. Id., at 322, n 18, 55 L Ed 2d 303, 98 S Ct 1079. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Montana vs. United States, *supra* 450 U.S. at 564.

---

[2]Kennerly vs. District Court, 400 U.S. 423 (1971).

[3]Fisher vs. District Court, 424 U.S. 382 (1976).

On that basis, amici and respondents are wrong to argue that it is petitioner's burden to demonstrate a "clear and plain" congressional statement to extend diversity jurisdiction onto Indian reservations. See e.g. United States vs. Dion, ____ U.S. ____, 90 L Ed. 2d 767 (1986). It is they who need to demonstrate an "express congressional delegation" in derogation of the clear language of the diversity statute, 28 U.S. Sec. 1332. They have not.

II. THE ERIE DOCTRINE IS NOT OFFENDED BY THE EXERCISE OF DIVERSITY JURISDICTION IN CASES INVOLVING RESERVATION INDIANS.

The real problem which this case presents has, therefore, nothing to do with any perceived threat to the sovereign status of Indian tribes. The difficulty here is in reconciling the doctrine of Erie R.R. vs. Tompkins, 304 U.S. 64, (1938) and the Rules of Decision Act, 28 U.S.C. Sec. 1652, with the infringement doctrine, as first announced in the *Williams* case. On this point, Iowa Mutual agrees with the analysis expressed by amicus United States, at page 23 of its Brief. Both *Erie* and the Rules of Decision Act provide a guide as to the basis for adjudicating a controversy that has been brought before a federal court. However, they do not determine the ability of that court to hear that controversy in the first place. There is no real conflict with Woods vs. Interstate Realty Co., 337 U.S. 535 (1949). There is no state "door-closing" statute involved here. No state policy is being frustrated. It is only federal law — and really federal common law — which is implicated.[4]

---

[4]Compare the discussion of federal common law in National Farmers Union Insurance Co. vs. Crow Tribe of Indians et al, 471 U.S. ____, 85 L. Ed. 2d 818 (1985) with Erie R.R. vs. Tompkins, *supra* at page 78: "There is no federal general common law."

Respondents and the other amici then raise the specter of disparate treatment, if cases like this one are allowed to proceed in federal court. Non-diverse parties with similar controversies will be relegated to tribal court, whereas diverse parties will be able to bring their cases in federal court, which, by the above-cited authorities, will decide those cases according to state law.

There are a number of responses to that perceived problem. First, one ought to admit that it is not a problem. This case demonstrates why. One need only ask — what body of law would the Blackfeet Tribal Court use in resolving Iowa Mutual's declaratory judgment action, concerning the application of its insurance policies? The Blackfeet Tribe has no insurance code, nor any recognized body of insurance law. The tribe's Law and Order Code does state:

> "In all civil cases and in all cases arising under Chapters 3 and 7, the Court shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances or customs of the Tribe, not prohibited by such Federal Law. Where any doubt arises as to the customs and usage of the Tribe, the court may request the advice of counselors familiar with these customs and usages. Any matters that are not covered by the traditional customs or by ordinances of the tribal court according to the laws of the state. The tribal court shall, in its discretion, turn over to other courts of records cases as it deems necessary." Blackfeet Tribal Code, Chapter 2: Civil Action, Sec. 2: Law Applicable.

Unless there are some Blackfeet customs dealing with commercial general liability policies, the tribe's own code suggests that state law will be the basis for any decision. Indeed, the respondents themselves tacitly concede as much, since their action in Blackfeet Tribal Court is predicated on Montana insurance law. (See for instance,

Joint Appendix, page 20.) As a practical matter, the same body of substantive law should be used to decide this case were it to proceed in tribal, state or federal court. If there is a potential for disparate treatment because the litigant in such a case happens to be a reservation Indian, the problem is not with the federal courts, but rather with the tribal court, which should be applying state law, but whose errors in such application are exempt from state court review.

A second response to the disparate treatment argument is that it is based on an unsound premise. By definition, almost every conceivable diversity case will involve a dispute between a reservation Indian and an outsider. The authority of the tribe over that outsider is questionable at best. Montana vs. United States, *supra*. Tribes do possess the limited ability to physically exlude such outsiders from their reservations or to tax them for activities for which they are permitted to conduct on them. See Merrion vs. Jicarilla Apache Tribe, 455 U.S. 130, 138-9 (1982); see also Montana vs. United States, *supra,* at p. 565. Admittedly, this court has speculated that tribes "may retain" civil authority to regulate the conduct of non-Indians on fee land "where that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id.* at page 566. The language employed suggests that an actual physical presence is required. Moreover, to apply that language to this case would completely eviscerate its meaning. It has been suggested that this private dispute between Iowa Mutual and the LaPlantes and Wellmans does threaten the political integrity of the Blackfeet Tribe because the authority of the tribe's court has been challenged. Such an argument is classic bootstrapping. It could be used in every dispute involving a non-member of the tribe. What

has been described as "limited authority" could thereby be translated into pervasive authority.

If Indian tribes have but "limited authority" over the activities of non-members, perhaps the reasoning of *Williams* and *Kennerly* ought to be re-examined. In stating as much, we concede that those two decisions — when considered in light of the facts of those two cases — appear proper. A dispute between the owner of a reservation trading post or grocery store and an Indian customer ought to be resolved on the reservation. However, the impact has been far greater than the credit disputes in *Williams* and *Kennerly*. The result has been to divest state courts of jurisdiction over all sorts of controversies, simply because one of the litigants happens to be a reservation Indian, regardless of the fact that tribal courts may be equally lacking in any real authority over the other litigant.[5] In truth, whatever authority that is possessed by tribal courts has come by default and cannot be reconciled with the broad principles set forth in *Wheeler, Oliphant, Merrion* and *Montana*.

Any problems of disparate treatment can be resolved by this court re-examining the rationale underlying Williams vs. Lee. The result ought to be a clearer demarcation of the line between tribal and state court

---

[5]Article VI, Sec. 1 of the Constitution of the Blackfeet Tribe of the Blackfeet Reservation, approved by the Secretary of the Interior pursuant to the Act of June 6, 1934 (48 Stat. 984) provides: "The Council of the Blackfeet Reservation shall exercise the following powers, subject to any limitations embodied in the body of the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this Constitution and the attached by-laws . . . (k) to promulage ordinances for the purpose of safeguarding the peace and safety of the residents of the Blackfeet Reservation, and *to establish minor courts for the adjudication of claims or disputes arising amongst the members of the tribe* charged with the commission of offenses set forth in such ordinances." (Emphasis added.)

jurisdication. The former should be recognized for what it was meant to be — a forum for resolution of intra-tribal disputes. Such a result is, in fact, fully consistent with two cases relied upon by the respondents and amici in their own analysis of the issue — Santa Clara Pueblo vs. Martinez, 436 U. S. 49 (1978) and Fisher vs. District Court, *supra,* since both cases do involve internal tribal matters. Other controversies, including those between reservation members and outsiders, belong elsewhere. They belong in the courts in which both the reservation members and outsiders may participate through their shared rights and obligations as citizens. If the boundaries of tribal and state court jurisdiction are more precisely drawn, the concern over disparate treatment will evaporate. The *Erie* doctrine will not be violated. Additionally the diversity statute can be applied as it was written, without the need to resort to the legalistic contortions advocated by respondents and amici, in their invocation of the abstention or preclusion doctrines, and without the risk of leaving any litigant or class of litigants without a proper judicial forum within which their disputes can be resolved.

IiI. ALLOWANCE OF DIVERSITY CLAIMS AGAINST RESERVATION INDIANS IS CONSISTENT WITH FEDERAL INDIAN POLICY.

Respondents and amici argue that allowing this type of lawsuit would frustrate federal Indian policy. That policy is identified as one of encouraging tribal self-government. Indeed, respondents refer to all sorts of congressional enactments which they contend buttress their analysis. See Respondents' Brief, pages 8-10.

While such legislation unquestionably manifests Congress' awareness of its stewardship responsibilities to Indian tribes, many of the enactments, particularly the

appropriation bills, serve as little more than tacit recognition of the deplorable financial condition of Indian tribes as a whole and of many of their individual members.

To argue that it is federal policy to strengthen tribal institutions really begs the question. The real question is to ask what the function or task of a particular institution is, be that institution strengthened through federal largesse or not. The institution of tribal courts exists, as argued above, to provide a forum for the resolution of internal tribal disputes. Strengthening such an institution should not be confused with an expansion of its role. The latter should not be encouraged, either expressly or implicitly, in the name of the former.

If there is a clear congressional expression of policy regarding the role of tribal courts, that expression can be found in Public Law 280. While this Court in Kennerly vs. District Court, *supra,* mandated strict compliance with the procedures set forth in that enactment for the assumption of full state civil jurisdiction on reservations, it is beyond argument that Public Law 280 exists to facilitate such transfers. Public Law 280 was enacted to promote the gradual assimilation of Indians into the dominant non-Indian culture. Three Affiliated Tribes vs. Wold Engineering *supra,* 90 L.Ed. 2d at page 890. Such assimilation is not fostered by the maintenance of barriers between tribal and state or federal courts; nor is it encouraged by an expansion of the role of the tribal courts, at the expense of state and federal systems. That assimilation is, however, furthered by not creating a judicial exception to the diversity statute.

The approach which we advocate is not inconsistent with this Court's own recent analysis of federal Indian policy in National Farmers Union Insurance Co. vs. Crow Tribe of Indians, et al, 471 U.S. ____, 85 L.Ed.2d 818 (1985), wherein the federal government's power over Indian tribes was characterized as "plenary." *Id.* at page 824. Admittedly the civil jurisdication of tribal courts over

non-Indian property owners was not "automatically foreclosed," (*Id.* at page 826) even though the question was, in the final analysis, found to be a federal one. By the same token, the question of tribal court civil jurisdication over non-Indian, *non*-property owners must be viewed as intrinsically federal.

Unlike the petitioner in *National Farmers,* Iowa Mutual did not initiate this action for the express purpose of challenging the jurisdiction of a tribal court (even though, admittedly, that issue has been drawn into this case). Iowa Mutual filed this action to pursue a federally sanctioned remedy under 28 U.S.C., Sec. 2201. The issue here is whether federal Indian policy has implicitly divested federal courts from the ability to provide that remedy. The policy considerations which led to the "deferral" approach in *National Farmers* do not exist here.

Given the plenary power of the federal government in this area, there is no reason to seek input from tribal courts before determining whether federal Indian policy justifies an implicit divestiture of federal jurisdiction over lawsuits between outsiders and reservation Indians. It is time, instead, to declare tribal court jurisdiction "automatically foreclosed," based upon the principles discussed above, which are drawn from existing statements of federal Indian policy. To do otherwise will be to expand — essentially by default — the jurisdiction of tribal courts beyond anything contemplated in the "relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Id.* at page 827. It ought to be recognized that life on Indian reservations today is vastly different than 100 years ago, when the federal government and the various tribes entered into the treaties creating those reservations.

Commercial and social interaction between reservation Indians and outsiders is a fact that must be confronted, particularly since it appears to be the policy of the federal government to encourage such interaction. Three Affiliated Tribes vs. Wold Engineering, *supra.* Iowa Mutual posits that assimilation of reservation Indians into the mainstream of American society will be discouraged, rather than encouraged, if a person's status as a reservation Indian means that the only place where disputes with him can be resolved will be tribal court. Outsiders such as Iowa Mutual will remain precisely that — outsiders. They will have to ask themselves whether the risks involved outweight any potential advantages of dealings with reservation Indians. In the long run, those dealings will be discouraged, to the ultimate detriment of both Indians and non-Indians alike. If diversity jurisdiction is going to be defeated in the name of protecting tribal self-government, it will be a pyrrhic victory indeed.

IV. THERE IS NO NEED FOR ANY FURTHER EVIDENCE OF CONGRESSIONAL INTENT TO BRING RESERVATION INDIANS WITHIN THE SCOPE OF THE DIVERSITY STATUTE.

Repsondents and amici employ historical analysis to argue that the diversity statue was never intended to apply to reservation Indians and that we need some expression of congressional intent that the statute be read in that fashion.

Their analysis is flawed. As the various authorities cited by respondents and amici implicitly establish, the question of civil jurisdiction over reservation related mat-

ters was not addressed by this court until the *Williams* case in 1959.[6]

The 1924 grant of citizenship status to Indians, now codified as 8 U.S.C., Sec. 1401(a)(2), came 35 years before the *Williams* decision and 14 years before Erie R.R. vs. Tompkins. This court should not be reluctant to implement that grant in conjunction with the diversity statute, 28 U.S.C., Sec. 1332, simply because back in 1924 Congress failed to anticipate the *Erie* and *Williams* cases, without which this dispute would not exist. In the final analysis, any acknowledgement that reservation Indians come within the scope of the diversity statute works no abrogation of any treaty rights. Cf. United States vs. Dion, *supra,* 90 L.Ed.2d at pages 773-774.

V. THE WEEKS CASE HAS NOT OBVIATED THE PROBLEM NOW BEFORE THIS COURT.

Attention has been directed to the recent decision from the Eighth Circuit Court of Appeals in Weeks Construction Inc. vs. Oglala Sioux Housing Authority, 797 F.2d 668 (1986). Even though the *Weeks* panel expressly declined to overrule Poitra vs. Demarrias, 502 F.2d 23 (8th Cir. 1974), cert. den'd, 421 U.S. 934 (1975), respondents and amici contend that the Eighth Circuit has now aligned itself with the Ninth Circuit's position as expressed in the *R. J. Williams* case.[7]

While we do not agree entirely with the *Weeks* court's analysis, the *Weeks* case can be readily distinguished from

[6]Respondents have made reference to the 1855 opinion of Attorney General Cushing quoted by this court in National Farmers Union Insurance Co. vs. Crow Tribe of Indians, et al, supra, 85 L. Ed.2d at page 826. However, consistent with our analysis, the passage quoted from Attorney General Cushing's opinion appears to be referring only to internal, intra-tribal matters, as opposed to disputes between members and non-members.

[7]R. J. Williams Co. vs. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983), cert. den'd. ____ U.S. ____, 87 L. Ed.2d 612 (1985).

the situation presented here. The critical focus of the *Weeks* court's analysis was the status of the defendant Housing Authority as a tribe-chartered entity. Since it was not a state chartered corporation, its citizenship status was questionable for diversity purposes, even taking into account the assumption that it conducted most of its business in South Dakota. 28 U.S.C., Sec. 1332(c); compare Burton vs. United States Olympic Committee, 574 F.Supp. 517 (C.D. Cal. 1983) with R.C. Hedreen Co. vs. Crow Tribal Housing Authority, 521 F.Supp. 599 (D. Mont. 1981). Under the circumstances, while we do not approve of the handling of the *Weeks* case, we can appreciate the hesitancy of the Court of Appeals to allow that litigation to proceed in federal court before allowing the tribal court to first consider the Housing Authority's status.

As opposed to the uncertainty over the citizenship status of a tribal housing authority addressed in *Weeks,* there is no question here as to the citizenship status of the LaPlantes and Wellmans. Congress resolved their status back in 1924. 8 U.S.C., Sec. 1401(a)(2). *Weeks* is therefore not in point.

VI. CONCLUSION

While the federal government has pre-empted state jurisdication over reservation Indian affairs, the federal government has never pre-empted itself. Respondents and amici have put forth no good reason why the diversity statute should not be applied as it was written, to all citizens of every state, including those citizens who happen to be reservation Indians. To create a judicial exception to the diversity statute serves no purpose but to expand — by default — the jurisdiction of tribal courts. Such an expansion furthers no meaningful federal policy. The judgments

of the courts below should be reversed with instructions to allow this diversity case to proceed in the Federal District Court of Montana.

DATED this 11th day of November, 1986.

MAXON R. DAVIS

Maxon R. Davis
CURE, BORER & DAVIS
P. O. Box 2103
Great Falls, Montana 59403
Attorneys for Petitioner,
Iowa Mutual Insurance Co.

No. 85-1589

In the Supreme Court of the United States

OCTOBER TERM, 1986

IOWA MUTUAL INSURANCE COMPANY, PETITIONER

v.

EDWARD M. LAPLANTE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

RICHARD G. TARANTO
Assistant to the Solicitor General

EDWARD J. SHAWAKER
LAURA E. FROSSARD
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, in an action brought by a citizen of one state against tribal Indians resident on a reservation in another state, where the events giving rise to the cause of action centered on the reservation and are the subject of a claim pending before the tribal court, the federal district court should refrain from exercising diversity jurisdiction unless the tribal court proceedings have been completed and the tribal court had no jurisdiction.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	6
Argument:	
I. This suit was properly dismissed in deference to tribal court jurisdiction	8
II. In the absence of tribal court jurisdiction, the limits of which present a federal question, the federal courts possess diversity jurisdiction over this suit and *Erie* would not require dismissal	19
Conclusion	26

TABLE OF AUTHORITIES

Cases:

A & A Concrete, Inc. v. *White Mountain Apache Tribe*, 781 F.2d 1411, cert. denied, No. 85-1598 (May 19, 1986)	15
American Indian Agricultural Credit Consortium, Inc. v. *Fredericks*, 551 F. Supp. 1020	6
American Indian National Bank v. *Red Owl*, 478 F. Supp. 302	6
Begay v. *Kerr-McGee Corp.*, 682 F.2d 1311	21, 23
Byrd v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525	23, 24
Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213	19
Cherokee Nation v. *Georgia*, 30 U.S. 1	16-17
Colorado River Water Conservation District v. *United States*, 424 U.S. 800	21
Elk v. *Wilkins*, 112 U.S. 94	16
Erie R.R. v. *Tompkins*, 304 U.S. 64	7, 22, 23, 24, 25
Fisher v. *District Court*, 424 U.S. 382	10, 11, 12, 15
Goodluck v. *Apache County*, 417 F. Supp. 13, aff'd, 429 U.S. 876	18

Cases—Continued: Page

Hot Oil Service, Inc. v. *Hall*, 366 F.2d 295 6
Kennerly v. *District Court*, 400 U.S. 423 11
Littell v. *Nakai*, 344 F.2d 486, cert. denied, 382 U.S. 986 6
McClanahan v. *State Tax Comm'n*, 411 U.S. 164 9
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 ..... 8, 19
Mescalero Apache Tribe v. *Jones*, 411 U.S. 145 9
Mitchell v. *Maurer*, 293 U.S. 237 22
Montana v. *United States*, 450 U.S. 544 ..... 8, 10
Morton v. *Mancari*, 417 U.S. 535 9
National Farmers Union Insurance Cos. v. *Crow Tribe of Indians*, No. 84-320 (June 3, 1985) ..5, 6-7, 10, 11, 12, 13, 14, 15, 19, 20
New Mexico v. *Mescalero Apache Tribe*, 462 U.S. 324 8
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 10
Paul v. *Chilsoquie*, 70 F. 401 16
Poitra v. *Demarrias*, 502 F.2d 23, cert. denied, 421 U.S. 934 ..... 6, 24
Rice v. *Rehner*, 463 U.S. 713 19
R.J. Williams Co. v. *Fort Belknap Housing Authority*, 719 F.2d 979, cert. denied, No. 83-1811 (June 17, 1985) 4, 5, 6, 22
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 ..... 8, 9, 13, 15, 19, 25
Three Affiliated Tribes v. *Wold Engineering (Three Tribes II)*, No. 84-1973 (June 16, 1986) 8, 10, 11, 24
United States v. *Wheeler*, 435 U.S. 313 ..... 8, 10, 19
University of Tennessee v. *Elliott*, No. 85-588 (July 7, 1986) 25
Washington v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 18
Weeks Construction, Inc. v. *Oglala Sioux Housing Authority*, 797 F.2d 668 6
White v. *Pueblo of San Juan*, 728 F.2d 1307 15
White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 ..... 1, 8
Williams v. *Lee*, 358 U.S. 217 ..... 9, 10, 11, 12, 15, 24, 25
Woods v. *Interstate Realty Co.*, 337 U.S. 535 ..... 22, 24
Worcester v. *Georgia*, 31 U.S. 515 16

Constitution and statutes: Page

U.S. Const.:
Art. III 23
§ 2 11
Amend. XIV 18
Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 17
Act of Mar. 3, 1887, ch. 373, 24 Stat. 552 17
Act of Aug. 13, 1888, ch. 866, 25 Stat. 433 17
Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1091 17
Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. 1401) 17
Act of May 14, 1934, ch. 283, 48 Stat. 775 17
Act of Aug. 21, 1937, ch. 726, 50 Stat. 738 17
Act of Apr. 20, 1940, ch. 117, 54 Stat. 143 17
Act of June 25, 1948, ch. 646, § 1332, 62 Stat. 930 17
Act of July 26, 1956, ch. 740, 70 Stat. 658 17
Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415 17
Act of Aug. 14, 1964, Pub. L. No. 88-439, 78 Stat. 445 17
Act of Oct. 21, 1976, Pub. L. No. 94-583, § 3, 90 Stat. 2891 17
Judiciary Act of Sept. 24, 1789, § 11, 1 Stat. 78-79 16
Rules of Decision Act, 28 U.S.C. 1652 23
Rev. Stat. § 563 (1875 ed.) 17
Rev. Stat. § 629 (1875 ed.) 17
25 U.S.C. 450 8
25 U.S.C. 450a 8
25 U.S.C. 476-479 9
25 U.S.C. 1301-1311 9
25 U.S.C. 1302 15
25 U.S.C. 1321(a) 9
25 U.S.C. 1322 ..... 11, 23
25 U.S.C. 1322(a) 9, 11
25 U.S.C. 1326 ..... 9, 11, 23
25 U.S.C. 1451 *et seq.* 9
28 U.S.C. 1331 ..... 5, 20
28 U.S.C. 1332 ..... 4, 11, 16, 18
28 U.S.C. 1332(a) 21

Constitution and statutes—Continued: Page

28 U.S.C. 1332(c) 21
28 U.S.C. 1441(a) 11
28 U.S.C. 1441(b) 11
28 U.S.C. 1738 25
Mont. Code Ann. § 2-1-302 (1985) 24
Blackfeet Tribal Code, ch. 1, § 5 13

Miscellaneous:

F. Cohen, *Handbook of Federal Indian Law* (1942) 9
Felix S. Cohen's Handbook of Federal Indian Law (R. Strickland ed. 1982) 8, 10, 16
Restatement (Second) of Judgments (1982) 22

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1589

IOWA MUTUAL INSURANCE COMPANY, PETITIONER

v.

EDWARD M. LAPLANTE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The United States has long been committed to fostering meaningful self-government and self-determination for Indian Tribes. See, *e.g.*, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143-144 & n.10 (1980). That objective requires proper deference to the role of tribal institutions, including tribal courts. It is thus directly implicated in this case, which concerns the appropriateness of federal court adjudication of a dispute, already the subject of a

suit in tribal court, in which the welfare of tribal members is significantly implicated.

STATEMENT

Iowa Mutual Insurance Company, an Iowa corporation, issued liability insurance policies to the Wellman Ranch, located within the Blackfeet Indian Reservation in Montana. The ranch was owned and operated by the Wellmans, enrolled members of the Blackfeet Indian Tribe. The Wellmans purchased the insurance policies at the office of an independent insurance agent located in Montana but off the reservation (Pet. 2-3).

1. On May 3, 1982, Edward LaPlante, an employee of the Wellman Ranch, was injured in a single vehicle accident on U.S. Highway 89 within the reservation. Alleging that he was acting within the course and scope of his employment at the time of the accident, LaPlante, joined by his wife, Verla La Plante, brought suit against the Wellmans in Blackfeet Tribal Court. They sought compensatory damages for personal injury and loss of consortium. The LaPlantes also named as defendants Iowa Mutual Insurance Company and Midland Claims Service, the insurance adjustor employed by Iowa Mutual. Against these defendants, the LaPlantes sought compensatory and punitive damages for the companies' alleged bad faith refusal to settle the LaPlantes' claims. The LaPlantes are both enrolled members of the Blackfeet Indian Tribe (J.A. 5-9).

Iowa Mutual and Midland Claims filed motions to dismiss for defective service of process, failure properly to allege tribal court jurisdiction, and lack of tribal court jurisdiction over the subject matter of the suit. In February 1984, the tribal court dismissed

the LaPlantes' complaint against the two companies without prejudice, concluding that the complaint had failed to allege the factual basis for tribal court jurisdiction and that service of process had been insufficient. Because these defects could be so easily cured, the tribal court also addressed the companies' argument that jurisdiction over the dispute was lacking because the companies are non-Indians (J.A. 35-39).

The tribal court ruled that the Blackfeet Tribe retained sufficient sovereignty over the reservation to regulate non-Indians when engaged in consensual commercial relations with Indians on the reservation (J.A. 36-37). By entering into an insurance contract with Blackfeet Indians (the Wellmans) covering a business located on the reservation (the Wellman Ranch), Iowa Mutual undertook to insure the Wellmans against exactly the kind of claim asserted by the LaPlantes (*id.* at 38). Moreover, the Tribe had a strong interest in Iowa Mutual's fulfillment of its contractual obligations because the health and welfare of tribal members were directly affected (*id.* at 39). Because the tribal court jurisdiction was co-extensive with the legislative jurisdiction of the Tribe (*id.* at 41), the tribal court had jurisdiction over this suit.

In March 1984 the LaPlantes filed an amended complaint that properly alleged that the Wellmans and the LaPlantes are Blackfeet tribal members and that the accident occurred on the reservation. Service was obtained on Iowa Mutual and Midland Claims in accordance with the Blackfeet Tribal Code. The pleading defects thus having been cured, Iowa Mutual and Midland Claims renewed their motion to dismiss for lack of subject matter jurisdiction. The tribal court denied the motion by summary order

in October 1984. A tribal court of appeals exists, but no appeal can be taken from the interlocutory jurisdictional ruling until after final judgment. The tribal court has not yet ruled on the merits of the dispute over the coverage of the Iowa Mutual insurance policies.

2. In May 1984, after the LaPlantes filed their amended complaint in tribal court, Iowa Mutual brought suit against the LaPlantes, the Wellmans, and the Wellman Ranch in the United States District Court for the District of Montana. Iowa Mutual sought a declaratory judgment that the LaPlantes' claims were not covered by the insurance policies it had issued to the Wellmans and that Iowa Mutual had no duty to indemnify or defend the Wellmans or the Wellman Ranch. Because Iowa Mutual is an Iowa corporation whose principal place of business is in Iowa, while all the named defendants are Montana citizens, Iowa Mutual alleged jurisdiction based on diversity of citizenship. 28 U.S.C. 1332.

In September 1984, the federal district court dismissed the case (Pet. App. 1a-2a). The court concluded that, under *R.J. Williams Co.* v. *Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), cert. denied, No. 83-1811 (June 17, 1985), it must refrain from entertaining the suit in diversity until the tribal court has been "afforded the opportunity to determine its jurisdiction" (*id.* at 2a). Only if the tribal court "decides not to exercise its exclusive jurisdiction" (*ibid.*) could the federal suit go forward. The district court issued this ruling after the tribal court had asserted jurisdiction over the suit in its February 1984 ruling but before it had denied Iowa Mutual's second dismissal motion in October.

The court of appeals affirmed (Pet. App. 3a-6a). The Ninth Circuit followed its holding in *R.J. Williams Co.* v. *Fort Belknap Housing Authority, supra*, that state court jurisdiction, and thus federal court diversity jurisdiction, may exist over a dispute arising on an Indian reservation only if the tribal court has decided not to exercise jurisdiction. 719 F.2d at 983-984. The court of appeals (Pet. App. 5a) found *R.J. Williams Co.* in accord with *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, No. 84-320 (June 3, 1985), in which this Court held that the lawful limits of tribal court jurisdiction over non-Indians presented a federal question under 28 U.S.C. 1331 but that a federal court should await an initial determination by the tribal court of its own jurisdiction. Thus, the court of appeals declined to reconsider *R.J. Williams Co.* and held that the district court correctly dismissed the case (Pet. App. 4a-6a).[1]

---

[1] After commencement of the LaPlantes' suit in tribal court, Midland Claims brought suit in federal district court against the LaPlantes, the Blackfeet Tribal Court, and the Blackfeet Tribe. Midland Claims sought a declaratory judgment that the tribal court lacked jurisdiction over the LaPlantes' bad faith claims against Midland Claims and Iowa Mutual and an injunction barring further tribal court proceedings. Iowa Mutual intervened as a plaintiff. The jurisdictional basis alleged was 28 U.S.C. 1331.

The district court dismissed the case for failure to state a claim. Midland Claims and Iowa Mutual appealed. While the appeal was pending, this Court rendered its decision in *National Farmers Union*, and the Ninth Circuit remanded the case to the district court for redetermination in light of *National Farmers Union*.

The district court on remand dismissed the action without prejudice so that Midland Claims and Iowa Mutual could first exhaust the remedies available under Blackfeet tribal law

Iowa Mutual subsequently filed a petition for a writ of certiorari. The petition alleged, among other things, that the Ninth Circuit ruling conflicted with the Eighth Circuit's decision in *Poitra* v. *Demarrias*, 502 F.2d 23 (1974), cert. denied, 421 U.S. 934 (1975). The Court granted the petition on May 27, 1986.[2]

SUMMARY OF ARGUMENT

The court of appeals and district court correctly required dismissal of the suit. The courts below followed the clear federal policy of promoting Indian tribal self-government by avoiding impairment of tribal court jurisdiction. That policy, as this Court held in *National Farmers Union Insurance Cos.* v.

(Br. in Opp. App. 1a-5a). The court recognized that the tribal trial court had already determined that it had jurisdiction over the subject matter and the parties (*id.* at 3a). Nonetheless, the district court held that the federal policy of promoting tribal self-government required exhaustion of tribal court remedies and that such exhaustion would not occur here until the tribal court of appeals had ruled on the jurisdictional issue (*ibid.*).

[2] The Ninth Circuit in this case and in *R.J. Williams Co.* had followed its similar holdings in *Hot Oil Service, Inc.* v. *Hall*, 366 F.2d 295 (1966), and *Littell* v. *Nakai*, 344 F.2d 486 (1965), cert. denied, 382 U.S. 986 (1966). By contrast, the district courts in *American Indian Agricultural Credit Consortium, Inc.* v. *Fredericks*, 551 F. Supp. 1020 (D. Colo. 1982), and *American Indian National Bank* v. *Red Owl*, 478 F. Supp. 302 (D.S.D. 1979), followed *Poitra* and entertained a diversity suit. More recently, the Eighth Circuit in *Weeks Construction, Inc.* v. *Oglala Sioux Housing Authority*, 797 F.2d 668 (1986), has substantially narrowed, and possibly undermined the reasoning of, the earlier ruling in *Poitra*.

Crow Tribe of Indians, No. 84-320 (June 3, 1985), requires not only that state and federal courts decline to hear a matter properly within the jurisdiction of a tribal court but also that the tribal court system be given the first opportunity to determine the limits of its own jurisdiction. Iowa Mutual's federal suit, which concerns precisely the same events and raises precisely the same issues as the case pending in the Blackfeet tribal court system, was properly dismissed because the tribal courts have not finally determined their own jurisdiction in the matter.

Nothing further is actually at issue at this stage of the litigation. We note, however, that *National Farmers Union* makes clear that, once the tribal court has had a full opportunity to determine its own jurisdiction by Iowa Mutual's exhaustion of appellate remedies in the tribal court system, federal court review of the tribal court's jurisdiction will be available. We submit, moreover, that it is equally clear that, if the tribal court is determined to lack jurisdiction, diversity jurisdiction over the dispute plainly exists—the dispute is between an Iowa citizen and Montana citizens and more than $10,000 is at issue—and that nothing in the doctrine that takes its name from *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), would bar the federal court from reaching the merits of the dispute. It is unnecessary for this Court now to decide whether principles of federal law might otherwise bar the suit and what rules of preclusion would apply when the federal court considers the tribal court's jurisdiction after the tribal court has already ruled on that issue.

ARGUMENT

I. THIS SUIT WAS PROPERLY DISMISSED IN DEFERENCE TO TRIBAL COURT JURISDICTION

A. It is by now firmly established that federal policy strongly promotes Indian tribal self-government. That policy is founded in the recognition that Indian tribes constitute political communities with substantial sovereign powers over their reservations. See, *e.g.*, *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 140, 146-148 (1982); *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981). Indeed, although "Congress has plenary authority to legislate for the Indian tribes in all matters," *United States* v. *Wheeler*, 435 U.S. 313, 319 (1978), tribes retain those aspects of their inherent sovereignty not withdrawn by statute or treaty or by implication from their dependent status, *id.* at 323, 326. See *Felix S. Cohen's Handbook of Federal Indian Law* 231-232 (R. Strickland, ed. 1982). This recognition of presumptive tribal sovereignty serves as a backdrop for the interpretation of federal statutes and treaties. *Three Affiliated Tribes* v. *Wold Engineering* (*Three Tribes II*), No. 84-1973 (June 16, 1986), slip op. 7; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142-143 (1980).

Federal policy goes beyond acknowledging the sovereign powers of Indian tribes. In accord with that acknowledgment, the United States has a long-standing policy of affirmatively promoting tribal self-government. See *Three Tribes II*, slip op. 13; *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334-335 & n. 17 (1983); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 62 (1978). This policy is reflected in numerous federal statutes. See, *e.g.*, 25 U.S. 450, 450a (Indian Self-Determination and Education Assistance Act); 476-479 (Indian Reorganization Act, as amended, providing for tribal government); 1301-1311 (Indian Civil Rights Act, recognizing powers of self-government, establishing "bill of rights," and providing for development of model code of Indian offenses for Indian courts); 1321(a), 1322(a), 1326 (Indian tribal consent, through majority vote, required for state assumption of civil or criminal jurisdiction over Indian country); 1451 *et seq.* (Indian Financing Act of 1974, tribal economic development). Based on these and other enactments, this Court has repeatedly recognized the "well-established federal 'policy of furthering Indian self-government.'" *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 62, quoting *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974).

The authority to regulate conduct on the reservation is one fundamental aspect of tribal self-government protected by federal policy. Thus, federal law has long granted Indian tribes a broad immunity from state regulation. *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 174-175 (1973); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973) (Indian tribes have "historic immunity from state and local control" of their reservations). Absent a governing Act of Congress, a state may not "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U.S. 217, 219-220 (1959).

Closely related to the power to exercise legislative jurisdiction, and of similar importance for tribal self-government, is the power to exercise adjudicatory jurisdiction over the reservation. Indeed, "the judicial powers of the tribe are coextensive with its legislative or executive powers." F. Cohen, *Handbook of Federal Indian Law* 145 (1942). As this

Court said in *United States* v. *Wheeler*, 435 U.S. at 332, "tribal courts are important mechanisms for protecting significant tribal interests" (footnote omitted).

Although tribal court criminal jurisdiction is subject to substantial federal limitations, see *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), tribal court civil jurisdiction is not subject to similar statutory limits and, indeed, is "very broad" (R. Strickland, *supra*, at 342 (footnote omitted)). See *National Farmers Union*, slip op. 8-10. The importance of tribal court civil jurisdiction is indicated both by its scope and by its protection from state interference. Thus, the judicial power of tribes extends to disputes between tribal members, *Fisher* v. *District Court*, 424 U.S. 382, 387-388 (1976), but also includes the "inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations," *Montana* v. *United States*, 450 U.S. at 565. Tribal court civil jurisdiction, moreover, has long been protected from state impairment by a prohibition, which has been interpreted to be very broad, on state court jurisdiction in cases between Indians, *Fisher* v. *District Court*, 424 U.S. at 388, and in cases brought by non-Indians against Indians, *Williams* v. *Lee*, 358 U.S. at 223, wherever such state jurisdiction would not be "consistent with Indian tribal sovereignty and self-government." *Three Tribes II*, slip op. 9-10 [3] Federal statutory law supplements these longstanding limitations on state court juris-

[3] By contrast, "tribal autonomy and self-government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country." *Three Tribes II*, slip op. 11. See also *Williams* v. *Lee*, 358 U.S. at 219.

diction: since 1968, federal law has required tribal consent, obtained by majority vote of enrolled members, before any state, with certain specifically enumerated exceptions, may assume civil jurisdiction over disputes arising in Indian country to which an Indian is a party. 25 U.S.C. 1322(a) and 1326. See *Three Tribes II*, slip op. 7-10 (statutory method codified at 25 U.S.C. 1322 is exclusive method for states to assume civil jurisdiction after its enactment in 1953; tribal consent requirement added in 1968); *Kennerly* v. *District Court*, 400 U.S. 423 (1971).

The federal policy to foster and protect tribal civil jurisdiction rests on several basic premises. Most important, the exercise of jurisdiction by a nontribal forum over suits brought by non-Indians against Indians arising out of on-reservation activities would undermine the authority of the tribal court—that is, of one branch of the tribal government—over reservation affairs. *Williams* v. *Lee*, 358 U.S. at 223. It would also create the risk of conflicting adjudications. See *National Farmers Union*, slip op. 11; *Fisher* v. *District Court*, 424 U.S. at 388. In addition, even apart from its effect on the law-making authority of tribal courts themselves,[4] adjudication by a nontribal

[4] Of course, diversity jurisdiction might be thought to interfere with law-making authority of state courts. But the Constitution and federal statute—in providing for diversity jurisdiction (U.S. Const. art. III, sec. 2; 28 U.S.C. 1332), and even for removal to federal court, where diversity exists, of many actions initially filed in state court (28 U.S.C. 1441(a) and (b))—have specifically addressed the potential for interference and determined that such concerns are outweighed by the competing interests in a litigant's avoidance of local court bias. With respect to Indian tribal courts, there is neither a removal statute nor any other constitutional or statutory provision overriding the interest in avoiding impairment of tribal

forum might impair tribal law-making authority, because tribal courts may be better qualified than non-Indian courts to interpret the often distinctive norms and practices of an Indian tribe.

As noted, the policy promoting tribal self-government and self-determination divests state courts, as a matter of federal law, of the authority to exercise jurisdiction that might impair tribal court civil jurisdiction. Correspondingly, it also places limits, as a matter of federal common law, on the authority of federal courts to exercise such intrusive jurisdiction. Thus, this Court held in *National Farmers Union* that the federal policy promoting tribal self-government requires a federal court to refrain from determining the legality of the tribal court's exercise of jurisdiction over non-Indians—a federal question ultimately reviewable in federal court—until the tribal court itself has had "a full opportunity to determine its own jurisdiction." Slip op. 11.

The rationale supporting the holdings in *National Farmers Union*, *Williams* v. *Lee*, and *Fisher* v. *District Court* similarly precludes the exercise of jurisdiction in a diversity case like Iowa Mutual's suit. *National Farmers Union* itself shows that the principle extends to federal as well as state courts. And the impairment of tribal court jurisdiction is just as serious when the federal court adjudicates the merits of an on-reservation contract or tort dispute as when it adjudicates the federal question of the tribal court's jurisdiction, for it is the provision of a forum in competition with the tribal court that

---

self-government. Certainly, the diversity statute does not override the Indian self-government policy, since a tribal court is no more foreign to a non-Indian litigant who resides outside the state of the Indian litigant than to a non-Indian litigant who resides in the state.

works the impairment. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 59 ("providing a federal forum for issues arising under [the Indian Civil Rights Act] constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself").

The federal tribal self-government policy thus bars Iowa Mutual's avowed attempt to have its liability under its insurance policies (arguably an on-reservation dispute) adjudicated in a forum other than tribal court, where the claimants brought suit. This principle is surely no less applicable where, as here, the tribal trial court has already made an initial determination that it has jurisdiction over the insurance coverage dispute. As *National Farmers Union* indicates, a proper respect for tribal courts requires "[e]xhaustion of tribal court remedies"—requires that the tribal courts be given a "full opportunity" to consider the issues and "to rectify any errors" they may make. Slip op. 11. The federal policy promoting Indian self-government fully comprehends the development of tribal appellate courts as well as tribal trial courts. There is no reason to suppose that appellate courts are less important in an Indian judicial system than they are in the state and federal systems.

The remedies in the Blackfeet Tribal Court system include appellate review, and Iowa Mutual has not yet obtained such review. Blackfeet Tribal Code, ch. 1, sec. 5. Until such appellate review is complete, the tribal courts will not have had a full "opportunity to evaluate the factual and legal bases for the challenge" and to "rectify any errors [they] may have made" (*National Farmers Union*, slip op. 10-11 (footnote omitted)). A final appellate ruling on the jurisdictional issue and on the merits will most

effectively provide an explanation to the parties of "the precise basis for accepting jurisdiction" and give to other courts "the benefit of [the tribal court's] expertise in such matters in the event of further judicial review" (*id.* at 11 (footnote omitted)). Until the Blackfeet Tribal Court system has issued a final judgment in the case, federal court adjudication of either the jurisdictional issue or the merits would undermine the clear federal policy promoting the development of tribal courts.

B. Contrary to Iowa Mutual's suggestion, entertainment of the suit in federal court is not warranted by virtue of Iowa Mutual's "very real concern about the competence of the Tribal Court and * * * a very real fear of local prejudice" (Pet. Br. 14).[5] First, such prospective allegations of bias and incompetence are not among the specifically enumerated exceptions to the exhaustion requirement recognized in *National Farmers Union*.[6] Unless this exhaustion requirement is to be eviscerated, such allegations must be made initially in the tribal court system. See *A & A Con-*

[5] Iowa Mutual asserts that the judges of the Blackfeet Tribal Court "serve at the pleasure of the Tribal Council" (Pet. Br. 14). In fact, the Blackfeet Tribal Code requires that removal of judges be for "cause" and only after notice and a hearing (Pet. App. 9a). Iowa Mutual also observes that the only qualifications for tribal court judges are that they be Blackfeet Tribe members, be more than 21 years old, and not be convicted felons (Pet. Br. 14). The Tribal Code states, in addition, that the judge should "preferably be a commercial law student at the time of the original appointment" (Pet. App. 9a).

[6] See slip op. 10, n.21 (exhaustion may not be required where assertion of tribal jurisdiction is motivated by desire to harass or conducted in bad faith or is "patently violative of express jurisdictional prohibitions" or where there is no adequate opportunity to challenge the tribal court's jurisdiction).

crete, Inc. v. *White Mountain Apache Tribe*, 781 F.2d 1411, 1416-1417 (9th Cir.), cert. denied, No. 85-1598 (May 19, 1986); *White* v. *Pueblo of San Juan*, 728 F.2d 1307, 1313 (10th Cir. 1984). Second, the Indian Civil Rights Act, 25 U.S.C. 1302, furnishes non-Indians appearing before tribal courts strong protections against unfair treatment: such litigants are guaranteed compulsory process, the right to retain counsel and to confront witnesses, equal protection, and due process of law, among other rights. Third, and of decisive importance, this Court, relying on the clear congressional policy promoting the development of tribal court civil jurisdiction, has squarely rejected the kind of broad attack on tribal courts that Iowa Mutual makes here: "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 65 (footnote omitted). See also *National Farmers Union*; *Fisher* v. *District Court*, *supra*; *Williams* v. *Lee*, *supra*.[7]

Nor, contrary to Iowa Mutual's suggestion, does the statutory grant of diversity jurisdiction override the federal policy requiring deference to tribal court civil jurisdiction. As we have noted, tribal self-determination and the authority of the tribal courts would seriously be undermined if either federal courts exercising diversity jurisdiction or state courts were free to resolve disputes within the tribal court's jurisdiction. Moreover, there is no indication whatever that Congress has, by establishing diversity ju-

[7] The tribal court's memorandum and order in this case (J.A. 33-44) is itself a powerful answer to Iowa Mutual's charges of incompetence.

risdiction, intended to impair the tribal court civil jurisdiction that it and this Court have so carefully fostered for many years.

The diversity statute itself makes no reference to Indians. 28 U.S.C. 1332. And nothing in the legislative history suggests any intent to override the tribal self-government policy. Section 11 of the Judiciary Act of Sept. 24, 1789, 1 Stat. 78-79,[8] by which Congress first created diversity jurisdiction, was clearly not intended to limit or abrogate tribal sovereignty and the tribal powers of self-government. Except for the Five Civilized Tribes, whose institutions were soon severely curtailed, judicial tribunals in the Anglo-American sense were largely unknown in the traditional Indian world of the eighteenth century.[9] Moreover, until the late nineteenth century most Indians were not considered citizens of the states in which their reservation was located or of a foreign state, *Elk* v. *Wilkins*, 112 U.S. 94, 102-104, 108-109 (1884); *Worcester* v. *Georgia*, 31 U.S. 515, 559 (1832), so a suit brought against an Indian would not meet the statutory requirement of diversity jurisdiction. *Paul* v. *Chilsoquie*, 70 F. 401, 402 (C.C.D. Ind. 1895); *Cherokee Nation* v. *Georgia*, 30 U.S. 1,

[8] Section 11 of the Judiciary Act (1 Stat. 78-79) provided:

> That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

[9] In 1883 the Bureau of Indian Affairs introduced Courts of Indian Offenses on Indian reservations. See R. Strickland, *supra*, at 333-334.

15-18 (1831) (Indian tribes are not foreign states, and individual Indian tribal members are not aliens). Diversity jurisdiction has often been revisited by Congress, most recently in 1976,[10] and the various amendments it has adopted are uniformly silent regarding any intention to limit or abrogate tribal court jurisdiction over non-Indians engaging in activities on the reservation.

Just as nothing in the history of the diversity statute suggests a limitation on tribal self-government, the policies underlying diversity jurisdiction do not support such a limitation. Iowa Mutual is surely correct that diversity jurisdiction seeks to free litigants from local forum bias, but it cannot plausibly be thought that Congress, in providing for diversity jurisdiction, intended to address non-Indian litigants' concerns about suspected tribal-court bias. There is no evidence of such an intent, and such an intent would run squarely counter to the congressional promotion of tribal courts. Moreover, even though Indians are citizens of the states in which they are domiciled,[11] diversity jurisdiction would be a very

[10] Act of Oct. 21, 1976, Pub. L. No. 94-583, § 3, 90 Stat. 2891; Act of Aug. 14, 1964, Pub. L. No. 88-439, 78 Stat. 445; Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415; Act of July 26, 1956, ch. 740, 70 Stat. 658; Act of June 25, 1948, ch. 646, § 1332, 62 Stat. 930; Act of Apr. 20, 1940, ch. 117, 54 Stat. 143; Act of Aug. 21, 1937, ch. 726, 50 Stat. 738; Act of May 14, 1934, ch. 283, 48 Stat. 775; Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1091; Act of Aug. 13, 1888, ch. 866, 25 Stat. 433; Act of Mar. 3, 1887, ch. 373, 24 Stat. 552; Act of Mar. 3, 1875, ch. 137, 18 Stat. 470; Rev. Stat. §§ 563, 629 (1875 ed.).

[11] The Act of June 2, 1924, ch. 233, 43 Stat. 253, provided that Indians born in the United States are United States citizens. This Act has been superseded by the current version, codified at 8 U.S.C. 1401. Indians, as citizens of the United States,

poor vehicle to provide non-Indians with a federal court alternative to tribal court. Under 28 U.S.C. 1332, diversity jurisdiction would be available only to non-Indians who happen to be citizens of a state different from that of the Indian litigant. To the extent there is a problem of bias in tribal courts, non-Indian litigants who are residents of the Indian litigants' state would surely have the same complaint; yet the diversity statute would address such litigants' complaint not at all.

In urging that its diversity suit should be entertained, Iowa Mutual argues (Pet. Br. 5-13) that diversity of citizenship plainly exists in the case and that Congress has created no exception to diversity jurisdiction for reservation Indians. This contention turns the well-established law governing tribal court civil jurisdiction on its head. Indian tribes do not require an affirmative grant of authority from Congress in order to exercise civil jurisdiction; rather, they possess a broad measure of civil jurisdiction over activities of non-Indians on Indian reservation lands as part of their inherent sovereignty. *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-153 (1980). Consequently, tribal civil jurisdiction over reservation activities exists unless limited by specific treaty provisions, by express federal legislation, or by implica-

---

are also citizens of the state in which they are domiciled. *Goodluck* v. *Apache County*, 417 F. Supp. 13, 15 (D. Ariz. 1975), aff'd, 429 U.S. 876 (1976). This conclusion also finds support in the first sentence of the Fourteenth Amendment to the United States Constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

tion from the tribe's dependent status. *National Farmers Union*, slip op. 10; *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). Moreover, "[r]epeal by implication of an established tradition of * * * self-governance is disfavored." *Rice* v. *Rehner*, 463 U.S. 713, 720 (1983). See also *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 60 ("a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent"). There is no indication of congressional intent to override the Indian self-government policy when diversity of citizenship happens to exist. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence * * * is that the sovereign power * * * remains intact." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. at 149 n.11.

II. IN THE ABSENCE OF TRIBAL COURT JURISDICTION, THE LIMITS OF WHICH PRESENT A FEDERAL QUESTION, THE FEDERAL COURTS POSSESS DIVERSITY JURISDICTION OVER THIS SUIT AND *ERIE* WOULD NOT REQUIRE DISMISSAL

Because deference to tribal courts' civil jurisdiction requires dismissal of Iowa Mutual's diversity suit,[12] the judgment of the court below should be

---

[12] The court of appeals directed that the diversity action be dismissed. If there are any statute of limitations problems, it would ordinarily be more appropriate for the district court to take jurisdiction but stay all proceedings pending the tribal court system's determination of tribal court jurisdiction. Cf. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213,

affirmed. We believe it appropriate, however, briefly to address several additional issues raised in the decision below, in other lower court decisions on this subject (see note 2, *supra*), and in the parties' briefs.

First of all, it is clear that Iowa Mutual can seek federal court review of the tribal court's jurisdiction once it has exhausted its tribal court remedies. *National Farmers Union* held that the limits of tribal jurisdiction over non-Indians present a federal question within the federal courts' jurisdiction under 28 U.S.C. 1331. Slip op. 7-10. It is likewise clear that, if the Blackfeet Tribal Court properly has jurisdiction, the federal court cannot impair that jurisdiction by relitigating the dispute between Iowa Mutual and its adversaries presented to the Blackfeet courts. Any such relitigation would directly undermine the federal policy requiring respect for tribal courts.

If, however, the tribal court lacks jurisdiction, the question remains whether the federal court may properly entertain the suit on the merits. Although we believe the court of appeals correctly affirmed the district court's dismissal of the action, we think that the court erred in two respects relevant to this remaining question. The first error may be considered technical, at least in this case: dismissal should not have been for lack of subject matter jurisdiction but for failure to state a claim. The second is more important and certainly not technical: the *Erie* doctrine does not bar entertainment of the suit.

A. It seems to us that the initial question of the district court's jurisdiction in this case is easily an-

222-223 (1966). Petitioner Iowa Mutual, however, made no such alternative request in the courts below, and has not asked for such relief in this Court.

swered by the diversity statute itself. Section 1332 (a) of title 28 of the United States Code states:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different States * * *.

This dispute plainly meets these straightforward requirements. Thus, the plaintiff is an Iowa citizen, since it is incorporated in Iowa and has its principal place of business there. 28 U.S.C. 1332(c). The defendants are all citizens of Montana, since they are all domiciled in Montana and Indians are citizens of the United States and of the states in which they are domiciled. See note 11, *supra*. And the dispute exceeds $10,000 in value (J.A. 2).

Since all of the statutory requirements are met, we submit that the proper conclusion is that diversity jurisdiction exists over this lawsuit. See *Begay* v. *Kerr-McGee Corp.*, 682 F.2d 1311, 1315 (9th Cir. 1982). It seems to us more in keeping with its common-law nature and origin to view the federal policy promoting Indian self-government, not as jurisdictional, but as a rule of decision, which, once jurisdiction in diversity exists, requires dismissal on the merits or a stay pending completion of the tribal court proceedings. Indeed, the option of staying rather than dismissing proceedings would seem incompatible with the treatment of the policy as jurisdictional. In this regard, we view the policy as closely analogous to the abstention doctrine, which this Court has not treated as affecting the federal court's jurisdiction. See *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976).

We note, however, that as far as this case is concerned, this conclusion is more a matter of analytical characterization than of substance.[13] Both courts below considered whether the federal policy promoting tribal self-government precludes the federal court from proceeding past the filing of the lawsuit to consider the rights of the parties under the insurance policies. In this case it matters little whether the courts' affirmative answer to the question is characterized as depriving the court of jurisdiction or of power to grant the relief requested. In either case the courts rightly concluded that "entertainment" of the suit is improper while the tribal court is adjudicating the dispute.

B. The court of appeals required dismissal not only because of the federal policy respecting tribal courts but also because of the *Erie* doctrine. Thus, the court followed *R.J. Williams Co.*, which indicated that, even if there is no tribal jurisdiction, federal diversity jurisdiction would be barred as long as the state in which the federal court sits would not exercise jurisdiction over the non-Indian's suit. In short, *R.J. Williams Co.* held, based on its reading of *Woods* v. *Interstate Realty Co.*, 337 U.S. 535 (1949), that federal diversity jurisdiction is wholly derivative of state jurisdiction. Where, as here, Montana has not assumed civil jurisdiction over the Blackfeet Indian Reservation, the federal district court in Montana must dismiss a diversity suit.

---

[13] Of course, in some situations the characterization of a rule as "jurisdictional" or going to the merits may have important consequences, *e.g.*, waiver of rights under the rule or preclusion in future cases. See, *e.g.*, *Mitchell* v. *Maurer*, 293 U.S. 237, 241-242 (1934); Restatement (Second) of Judgments § 12, at 115 (1982).

We submit that this analysis is erroneous. *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), concerns the rules of law that a federal court must apply in a diversity case. As the Ninth Circuit itself noted in *Begay* v. *Kerr-McGee Corp.*, 682 F.2d at 1316-1317, the question of choice of law under *Erie* arises only after the requirements of diversity jurisdiction have already been met. Moreover, *Erie* generally requires, in accordance with the Rules of Decision Act, 28 U.S.C. 1652, that state law be applied to most, but not all, of the issues that arise in the lawsuit. As this Court held in *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 536-537 (1958), state law is not to be applied when it is not "intended to be bound up with the definition of the rights and obligations of the parties," at least as long as there are "affirmative countervailing considerations" based on federal policy.

Accordingly, the unavailabilty of the Montana state courts as a forum for non-Indian suits against Indians like Iowa Mutual's suit does not deprive the federal court of the power to entertain the suit. The mere absence of jurisdiction in the state court, standing alone, does not furnish a state law to be applied to bar the suit. Diversity jurisdiction is created by federal statute and Article III of the Constitution, and is not merely derivative of state court jurisdiction. Where, as here, the absence of state court jurisdiction results only from the federal statute requiring tribal consent, and not from any independent state judgment concerning the rights and obligations of non-Indians and Indians,[14] there is no state law to be applied under *Erie*.

---

[14] We assume, *arguendo*, that it is solely federal law (25 U.S.C. 1322, 1326), that accounts for the absence of state

Contrary to the Ninth Circuit's reasoning, this Court's decision in *Woods* is entirely in accord with this analysis. There may have been room to debate which was the correct side of the line separating "substantive" from "procedural" state laws for the state "door-closing" statute there at issue. But the statute in *Woods* obviously reflected an affirmative state policy and hence was properly subject to analysis under the *Erie* doctrine. As the Eighth Circuit rightly concluded in *Poitra* v. *Demarrias*, *supra*, it is this threshold requirement for *Erie*'s application that the federally imposed absence of state court jurisdiction over Indian country fails to meet.[15]

There is, however, a possible impediment to the exercise of either state court or diversity jurisdiction in this Court's decision in *Williams* v. *Lee*, *supra*, which held that a state court should dismiss a claim by a non-Indian against an Indian, regarding on-reservation activities, that could be asserted and ad-

---

court jurisdiction in Montana in cases like this one. Indeed, under Montana law, the Governor has power to proclaim criminal or civil jurisdiction over tribal territory at the request of a tribe and with the relevant county's consent. Mont. Code Ann. § 2-1-302 (1985). Of course, if this litigation reaches the appropriate stage, it might be open for respondents here to argue that there is in fact an affirmative, substantive Montana policy barring suits like this from its courts and that, following the analysis in *Byrd*, there is no countervailing federal interest.

[15] In addition, there is an affirmative federal interest in providing a forum for the resolution of disputes where jurisdiction properly lies. Cf. *Three Tribes II*, slip op. 11 ("The federal interest in ensuring that all citizens have access to the courts is obviously a weighty one"). This interest must surely play a large role in the *Byrd* analysis, especially if no other forum exists.

judicated in tribal court. There is, in our view, no need for this Court to address in this case whether that principle would extend to the kind of declaratory relief sought here, which does not involve any ultimate claim for monetary or other relief against an Indian.

C. Two final issues deserve brief mention at this time, though not, we think, resolution. First, although state law, applicable through *Erie*, would not require dismissal of the diversity suit once the tribal court is determined not to have jurisdiction, it is a separate question, on which we offer no view, whether principles of federal law (including the just-mentioned *Williams* v. *Lee* principle) might suggest refusal to entertain the suit, if only to avoid discrimination between those non-Indians who can claim diversity and those who cannot. Second, it is also unclear whether, and to what extent, principles of preclusion should apply to the federal court's consideration of the tribal court's jurisdiction after the tribal court has ruled on its own jurisdiction—for example, to redetermination by the federal court of the tribal court's findings of "jurisdictional facts." Although 28 U.S.C. 1738 does not directly apply, preclusion principles have been developed as federal common law, see *University of Tennessee* v. *Elliott*, No. 85-588 (July 7, 1986), slip op. 5, and in some circumstances, tribal court judgments have been given preclusive effect, see *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 65, n.21. We note here only that strict preclusion might result in their being no federal forum for the resolution of a federal question, but we express no view at this time on what preclusion principles, if any, should apply in this context, and we believe it would be premature for this Court to address the question.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

RICHARD G. TARANTO
Assistant to the Solicitor General

EDWARD J. SHAWAKER
LAURA E. FROSSARD
Attorneys

SEPTEMBER 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20330

No. 85-1589

In The
Supreme Court of the United States
October Term, 1985

IOWA MUTUAL INSURANCE COMPANY,
Petitioner,

v.

EDWARD M. LaPLANTE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE BLACKFEET TRIBE OF INDIANS

JEANNE S. WHITEING
Attorney at Law
2909 4th Street
Boulder, Colorado 80302
(303) 449-4926

PHILIP E. ROY
DONALD G. KITTSON
Blackfeet Legal Department
P.O. Box 849
Browning, Montana 59417
(406) 338-7777

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

Pages

INTEREST OF AMICUS BLACKFEET TRIBE OF INDIANS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Federal Diversity Statute and the Rules of Decision Act Do Not Apply to Reservation Based Claims Involving Indian Defendants. 4

A. General Federal Laws Do Not Apply to Indians If They Abrogate Tribal Rights Unless Congress Indicates Its Intent To Do So. 6

1. The Diversity Jurisdiction Statute and Rules of Decision Act Conflict With Indian Immunity From State Law and Protection of Tribal Self-Government. 7

2. The Diversity Jurisdiction Statute By Its Terms Did Not Apply to Indians When Enacted. 11

3. The Citizenship Act Did Not Alter or Amend Indian Immunity From State Law. 14

B. Application of the Diversity Jurisdiction Statute to Indians Conflicts With the Policy of *Erie* and *Woods*. 16

C. Perceived Local Prejudice Does Not Justify Abrogation of Indian Immunity From State Law or Protection of Tribal Self-Government. 17

II. Federal Diversity Jurisdiction is Limited Even If a Tribe Chooses Not to Exercise Its Exclusive Jurisdiction 19

CONCLUSION 20

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

American Indian Agr. Credit Consortium v. Fredericks, 551 F.Supp. 1020 (D. Colo. 1982) 5

American Indian Nat. Bank v. Red Owl, 478 F.Supp. 302 (D. S.D. 1979) 5

Begay v. Kerr-McGee Corp., 682 F.2d. 1311 (9th Cir. 1982) 5

Bowling v. United States, 233 U.S. 528 (1914) 15

Boyer v. Shoshone-Bannock Indian Tribes, 441 P.2d 167 (D. Idaho 1968) 15

British American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936) 9

Bryan v. Itasca County, 426 U.S. 373 (1976) 8

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 12, 16

Elk v Wilkins, 112 U.S. 94 (1884) 13

Erie v. Tompkins, 304 U.S. 64 (1938) 3, 12, 16, 17

Fisher v. District Court, 424 U.S. 382 (1976) 8

Goodluck v. Apache County, 417 F.Supp. 13 (D. Ariz. 1975) 13

Hallowell v. United States, 221 U.S. 317 (1911) 15

Hot Oil Service, Inc., v. Hall, 366 F.2d 295 (9th Cir. 1966) 5, 10

Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956) 15

Kennerly v. District Court, 400 U.S. 423 (1971) 8, 10, 11, 16, 19

Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965) 5, 10

McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) 4, 7, 8, 9, 19

TABLE OF AUTHORITIES—Continued

Page

Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 4, 15

Morton v. Mancari, 417 U.S. 535 (1974) 6

National Farmers Union Ins. Co. v. Crow Tribe, 105 S.Ct. 2447 (1985) 4, 5, 7

Oneida Indian Nation v. County of Oneida, 464 F.2d 916 (2d Cir. 1972), *rev'd and remanded on other grounds*, 414 U.S. 661 (1974) 16

Poitra v. Demarrias, 502 F.2d 23 (8th Cir. 1974) 5

R. J. Williams v. Fort Belknap Housing Auth., 719 F.2d 979 (9th Cir. 1983) 5, 10, 19

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 8, 10

Squire v. Capoeman, 351 U.S. 1 (1956) 6

Standing Rock Sioux Tribe v. Dorgan, 505 F.2d 1135 (8th Cir. 1974) 16

Superior Oil Co. v. Merritt, 619 F.Supp. 526 (D. Utah 1985) 5, 10

Three Affiliated Tribes v. Wold Engineering, 106 S.Ct. 2305 (1986) 20

Tiger v. Western Inv. Co., 221 U.S. 286 (1911) 15

Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976) 14

United States v. Celestine, 215 U.S. 278 (1909) 15

United States v. Dion, 106 S.Ct. 2216 (1986) 6, 7, 16

United States v. Nice, 241 U.S. 591 (1916) 15

United States v. Holliday, 70 U.S. (3 Wall) 407 (1866) 15

United States v. Wright, 53 F.2d 300 (4th Cir., 1931) *cert. denied* 285 U.S. 539 (1932) 14

TABLE OF AUTHORITIES—Continued

Page

Weeks Construction, Inc. v. Oglala Sioux Housing Auth., Nos. 85 and-5129 and 5130 (8th Cir. slip opinion filed July 29, 1986) 5, 10, 19

Williams v. Lee, 358 U.S. 217 (1959) 7, 9, 10, 11

Winton v. Amos, 255 U.S. 373 (1921) 15

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 9

Woods v. Interstate Realty Co., 337 U.S. 535 (1949) 3, 16, 17

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 7, 12, 13

CONSTITUTION AND STATUTES:

U.S. Const. Art. I § 8, cl. 3 12

U.S. Const. Art. I, § 2, cl. 3 ..... 12, 13

Treaty of October 17, 1855, 11 Stat. 657 9

Act of Feb. 8, 1887, 24 Stat. 388, 25 U.S.C. § 349 14

Act of Feb. 22, 1889, 25 Stat. 276 9

Act of June 2, 1924, 43 Stat. 253 (codified as carried forward at 8 U.S.C. § 1401(b) 14, 15, 16

Act of June 18, 1934, 48 Stat. 986 ..... 1, 8

Act of Aug. 15, 1953, 67 Stat. 588 (Public Law 280) 8, 20

1 Stat. 73 (Judiciary Act of 1789) 4, 10, 12, 13

29 Stat. 353 2

88 Stat. 77, 25 U.S.C. § 1451 et seq. (Indian Financing Act) 8, 11

88 Stat. 2203, 25 U.S.C. § 450 et seq. (Indian Self-Determination and Education Assistance Act) 8

TABLE OF AUTHORITIES—Continued

Page

25 U.S.C. § 1302(8) 20

25 U.S.C. § 1326 ..... 8, 10

28 U.S.C. § 1322(1) (Federal Diversity Jurisdiction Statute) ..... *passim*

28 U.S.C. § 1652 (Rules of Decision Act) ..... *passim*

OTHER AUTHORITIES:

Art. IX, Articles of Confederation 13

F. Cohen, Handbook of Federal Indian Law (1982) 5, 12, 16, 19

Hart & Wechsler's The Federal Courts and the Federal System, Bator, Mishkin, Shapiro & Wechsler, ed. 1973 10

R. Strickland, Fire and the Spirits (Norman: University of Oklahoma Press, 1975) 13

S. Tyler, A History of Indian Policy (Washington: GPO 1973) 12

Wright, Law of Federal Courts (1976) 18

INTEREST OF AMICUS BLACKFEET TRIBE OF INDIANS

The Blackfeet Tribe of Indians of the Blackfeet Reservation is a federally recognized tribe organized under the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 986. The Blackfeet Tribal Business Council is the governing body of the Blackfeet Reservation, and is responsible under the Tribe's Constitution for, among other things, the establishment of minor courts for the adjudication of claims or disputes and for the trial and punishment of offenses. The Tribe operates the Blackfeet Tribal Court system which exercises civil and criminal jurisdiction. Civil jurisdiction is exercised over "all suits wherein the defendant is a member of the Tribe."[1] The events out of which the present case arose took place on the Blackfeet Reservation. Defendants LaPlantes and Wellmans are all members of the Blackfeet Tribe.

The present controversy is a dispute between tribal members. the LaPlantes and Wellmans, involving the liability of one for the accident of the other. Iowa Mutual, as the Wellmans' insurer, is an integral part of the settlement of this dispute between members. A lawsuit to resolve the dispute was filed by the LaPlantes in tribal court before the present federal action was filed. J.A. 5-9. The suit named the Wellmans, Iowa Mutual and Midland Claims Service. The Tribal Court determined that it had jurisdiction in the case and refused to dismiss it for lack of

---

[1] A copy of the relevant portion of the Blackfeet Tribal Code is attached as Appendix A. The portion of the Tribal Code in the Appendix to Iowa Mutual's Petition for Certiorari, Pet. App. 7a-9a, contains the provisions relating to the tribal court's criminal jurisdiction, not its civil jurisdiction.

jurisdiction. J.A. 33-42. Iowa Mutual never brought its present claim in tribal court.[2]

Under its Constitution, the Blackfeet Tribe exercises jurisdiction within the confines of the Blackfeet Reservation boundaries as defined in the Agreement of September 26, 1895, ratified by Congress in 1896, 29 Stat. 353. The integrity of that jurisdiction and the authority of the Tribe's courts will be affected by the outcome of the present case. The Tribe has a vital interest in insuring that its authority and power as a self-governing Indian tribe and the authority of its tribal courts to adjudicate disputes arising out of transactions within its territory are not diminished. The Blackfeet Tribe therefore files this amicus brief in support of respondents' position.

SUMMARY OF ARGUMENT

The federal diversity jurisdiction statute does not apply to the kind of case, like the present one, which involves Indian defendants and reservation based claims. The diversity jurisdiction statute conflicts with another federal legislative scheme providing for Indian immunity

[2] As a defense to a claim for bad faith insurance adjusting brought in tribal court by the LaPlantes, Iowa Mutual answered that LaPlantes' injuries were not covered by any of the insurance policies it sold to the Wellmans. However, it never sought a declaratory judgment in tribal court that LaPlantes' claim for negligence against the Wellmans was not covered by insurance policies issued by Iowa Mutual. Iowa Mutual argues that the Blackfeet Tribal Code has no provisions for declaratory judgment actions. But if the Code does not specifically provide for such actions, neither does it preclude them. The Code does provide that the Tribal Court may apply federal law and regulations (which it interprets to include federal procedural rules) in all civil cases to fill any gaps in tribal law. In any event, the question of whether declaratory judgment actions can be brought in tribal court is a question of tribal law which can only be decided by the tribal court.

from state law and protection of tribal self-government. The diversity statute subjects Indian defendants to state law through the Rules of Decision Act, and infringes on tribal self-government. However, there is no indication, explicitly or implicitly, in the jurisdiction diversity statute or the surrounding circumstances that Congress intended the statute to abrogate Indian immunity from state law or to diminish the right of tribal governments to make their own laws and be ruled by them. Application of the diversity statute to cases like the present action also conflicts with the policy of *Erie v. Tompkins*, 304 U.S. 64 (1938) and *Woods v. Interstate Realty Co.*, 337 U.S 535 (1949), which discourages forum shopping and discrimination against in-state residents in favor of out-of-state residents.

Abrogation of Indian immunity from state law and protection of tribal self-government also is not justified on the ground that Congress intended to provide a forum free from local prejudice. In order for abrogation to be accomplished, Congress still must make its intent to abrogate clear through implicit or explicit action. It has not done so here. While amicus Blackfeet Tribe does not believe that there is any justification for federal diversity jurisdiction in this case, if such justification does exist, it is for Congress to act on and not this Court. In any case, petitioner's fears of prejudice and concerns about the competence of the Blackfeet Tribal Court are greatly exaggerated and have no basis in fact.

Because there is no federal diversity jurisdiction in the present case, the case must be dismissed. However, the Ninth Circuit in its decision below indicated that federal diversity jurisdiction is not limited if the Blackfeet Tribe chooses not to exercise jurisdiction, presumably because

there would be no infringement on tribal self-government. The Tribal Court has determined that it does have jurisdiction, but if at some point it is determined that the Tribal Court has chosen not to exercise its exclusive jurisdiction, federal diversity jurisdiction still is limited. State law is preempted by federal law in cases involving Indian defendants in reservation-based claims whether or not it infringes on tribal self-government. For this reason, the federal court could not apply state law, and it is doubtful that it could apply tribal law.

—o—

ARGUMENT

I. The Federal Diversity Jurisdiction Statute and the Rules of Decision Act Do Not Apply to Reservation Based Claims Involving Indian Defendants.

This case presents an issue requiring the construction of competing federal legislative schemes: 1) the federal diversity jurisdiction statute, 28 U.S.C. § 1322(1), and the Rules of Decision Act, 28 U.S.C. § 1652, both part of the original Federal Judiciary Act of 1789, 1 Stat. 73; and 2) the various treaties and statutes which together establish the federal legislative scheme immunizing Indians from state law and protecting tribal self-government, *see National Farmers Union Ins. Co. v. Crow Tribe*, 105 S.Ct. 2447, 2451 (1985); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172-179 (1973); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 474 (1976). A review of the competing federal legislative schemes shows no indication that Congress intended to extend the reach of the diversity jurisdiction statute or the Rules of Decision Act to invade Indian immunity from state law or federal protection of tribal self-government. *See National Farmers Union Ins. Co. v. Crow Tribe, supra* at 2453 ("there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation."); F. Cohen, *Handbook of Federal Indian Law* 253-254 (1982) (hereinafter cited as Cohen) ("In the civil field, however, Congress has never enacted general legislation to supply a federal or state forum for disputes between Indians and non-Indians in Indian country") quoted in *National Farmers Union, supra* at 2453 n.17.

The courts which have considered the issue of diversity jurisdiction in cases involving Indian defendants have invariably found that such jurisdiction is precluded where the action arose on the reservation. *Weeks Construction, Inc. v. Oglala Sioux Housing Auth.*, Nos. 85-5129 and 5130 (8th Cir. slip opinion filed July 29, 1986); *R.J. Williams v. Fort Belknap Housing Auth.*, 719 F.2d 979 (9th Cir. 1983); *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311 (9th Cir. 1982); *Hot Oil Service, Inc. v. Hall*, 366 F.2d 295 (9th Cir. 1966); *Littell v. Nakai*, 344 F.2d 486 (9th Cir. 1965); *Superior Oil Co. v. Merritt*, 619 F.Supp. 526 (D. Utah 1985). The sole exception is *Poitra v. Demarrias*, 502 F.2d 23 (8th Cir. 1974), which the Eighth Circuit in *Weeks Construction, supra*, now has interpreted as being a very narrow exception to the general rule that federal diversity jurisdiction is precluded.[3]

[3] The narrow exception occurs in actions involving state-created causes of action. *Weeks*, slip opinion at 10 n.7. *Poitra* involved a state-created fund for car accident victims pursuant to the North Dakota non-resident motorist statute. 502 F.2d *supra* at 24. Two district court decisions have followed *Poitra*: American Indian Agr. Credit Consortium v. Fredericks, 551 F. Supp. 1020 (D.Colo. 1982); and American Indian Nat. Bank v. Red Owl, 478 F.Supp. 302 (D. S.D. 1979). The correctness of these decisions is now questionable after the Eighth Circuit's decision in the *Weeks* case.

In light of the case law, and given the historical and overriding importance of the federal law protecting Indians from state law, and given Congress' lack of any specific or implied intent to apply the federal diversity statute to Indians, the federal diversity jurisdiction statute cannot be read to apply to cases involving Indian defendants where the cause of action arose on the reservation.

A. General Federal Laws Do Not Apply to Indians If They Abrogate Tribal Rights Unless Congress Indicates Its Intent To Do So.

General federal laws like the diversity jurisdiction statute and the Rules of Decision Act are not applicable to Indians if they conflict with rights under federal treaties or law, unless there is "clear evidence that Congress actually considered the conflict" and chose to resolve that conflict by abrogating the federal law or treaty applicable to the Indians. *United States v. Dion*, 106 S.Ct. 2216, 2220 (1986). The requisite intent may be found in an express statement of Congress or in the legislative history and surrounding circumstances of the act, although an explicit statement is preferable. *Id.*

This rule has been interpreted to hold that the general federal income tax laws do not apply to income from sales of timber from allotted Indian lands because they conflict with protections in the General Allotment Act. *Squire v. Capoeman*, 351 U.S. 1 (1956), and to hold that the Equal Opportunity Act of 1972 did not repeal or alter other federal laws giving Indians preference in employment in the Bureau of Indian Affairs, *Morton v. Mancari*, 417 U.S. 535 (1974). On the other hand, this Court recently interpreted the Bald Eagle Protection Act as applying to the killing of eagles by Indians because Congress "reflected an unmistakable and explicit legislative choice" to abrogate

the Indians' treaty rights. *United States v. Dion, supra* at 2223. Congress had explicitly considered the effect of the statute on Indians and chose to provide only limited protection to them for religious purposes.

Application of the federal diversity jurisdiction statute and the Rules of Decision Act conflicts with federal law providing for Indian immunity from state law and protection of tribal self-government, *see* Part I.A.1 *infra*. However, there is nothing in the Judiciary Act of 1789 or any other federal act or in the surrounding circumstances of the acts which reflects an unmistakable and explicit policy choice to subject Indians to state law through application of federal diversity jurisdiction. Nor is there anything that indicates that Congress considered at all the effect of the statutes on Indian tribes. Under these circumstances, the general federal law cannot be read to apply to Indians.

1. The Diversity Jurisdiction Statute and Rules of Decision Act Conflict With Indian Immunity From State Law and Protection of Tribal Self-Government.

Indian immunity from state law is one of the fundamental elements of tribal self-government. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). This immunity is based on federal treaties and statutes which preempt state laws in Indian country. Although over the years, the exact nature and scope of tribal self-government may have changed, *see National Farmers Union Ins. Co. v. Crow Tribe*, 105 S.Ct. *supra* at 2451, Indian immunity from state law has consistently remained federal law. *See Worcester v. Georgia, supra; Williams v. Lee*, 358 U.S. 217 (1959); *McClanahan v. Arizona Commission*, 411 U.S. 164 (1973). The articulation of the law in *Williams v. Lee, supra*, es-

tablished the guidelines against which modern cases are decided. Thus the right of reservation Indians to make their own laws and be ruled by them," *id.* at 220, continues to be one of the basic attributes of tribal governments, including the right to exercise exclusive jurisdiction over reservation based claims involving Indian defendants. *See Kennerly v. District Court*, 400 U.S. 423 (1971).[4]

In a latter day recognition of Indian immunity from state law, Congress has given its permission for states to assume civil and criminal jurisdiction over reservation Indians by legislative action. Act of Aug. 15, 1953, 67 Stat. 588 (Public Law 280). Public Law 280 makes clear that Indians are immune from state law unless states legislatively assume jurisdiction under the terms of the Act. *See Kennerly v. District Court, supra.* Since 1968, assumption of jurisdiction also requires tribal consent. 25 U.S.C. § 1326.

Congress has continually acted to protect and encourage tribal self-government. *E.g.*, Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. § 461 *et seq.;* Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.;* Indian Financing Act, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.* This federal statutory recognition and protection of tribal self-government further bolsters the continuing validity of Indian immunity from state law. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Fisher v. District Court*, 424 U.S. 382 (1976); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *McClanahan v. Arizona Tax Commission, supra; Kennerly v. District Court, supra.* These statutes have also been relied on as the basis for preemption of state

[4] Indeed Iowa Mutual appears to concede that Montana state courts would not have jurisdiction to adjudicate its claim. *See* Petitioner's Brief at 5 and 7.

law in the civil regulatory area, *e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

In the present case, specific treaties and statutes reserve to the Blackfeet Tribe exclusive jurisdiction over its reservation. The Blackfeet Reservation was originally reserved to the Tribe by Treaty of October 17, 1855, 11 Stat. 657. Article 4 of the Treaty provides that a certain large territory in what is now northwestern Montana "shall be the territory of the Blackfoot Nation, over which said nation shall exercise exclusive control . . . ." The reservation was subsequently reduced to its present size by a series of executive orders and cessions. *See British American Oil Producing Co. v. Board of Equalization of the State of Montana*, 299 U.S. 159, 162-63 (1936). Even less explicit treaty language than that found in the 1855 Treaty has been construed as recognition that "the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." *Williams v. Lee, supra* at 221-22. *See McClanahan v. Arizona Tax Commission, supra* at 174-75.

Montana's entry into the Union, like Arizona's, was conditioned by Congress on a disclaimer of jurisdiction over Indians and Indian property, further congressional recognition of exclusive tribal jurisdiction over reservation matters, Act of Feb. 22, 1889, 25 Stat. 276, 277.[5]

[5] The Enabling Act which also admitted North Dakota, South Dakota and Washington to the Union required that the new states:

> forever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indian or any Indian tribes, . . . and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

The Enabling Act also provided that the state constitutions:

> shall be republican in form, and make no distinction in civil or political rights on account of race or color, *except as to Indians not taxed*. . . .

(Emphasis added). *See* Part I.A.2 *infra*.

Although Montana could have assumed civil jurisdiction over reservation Indians pursuant to Public Law 280, Montana has never taken such action with respect to the Blackfeet Tribe. *Kennerly v. District Court,* 400 U.S. *supra* at 425 (1971). Tribal consent is now required before such jurisdiction can be assumed. 25 U.S.C. § 1326.

A federal court sitting in a diversity case would be required by the Rules of Decision Act to apply state law.[6] This would conflict squarely with the Indians' immunity from state law. This immunity is based on the federal treaties and statutes cited above which preempt state law in favor of exclusive tribal control.

In addition, the diversity statute as a general matter interferes with the status of Indian tribes as self-governing bodies within the reservation by providing a federal forum for activities which are within the exclusive jurisdiction of the tribe. Subjecting Indians to federal diversity jurisdiction would undermine the authority of tribal courts. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59-60 (1977); *Williams v. Lee, supra; Weeks Construction, Inc. v. Oglala Sioux Housing Auth., supra; R.J. Williams v. Fort Belknap Housing Auth., supra; Hot Oil Service Inc. v. Hall, supra; Littell v. Nakai, supra; Superior Oil Co. v. Merritt, supra.* It would mean that important cases—

---

[6] It is doubtful that the Rules of Decision Act can be read to include application of tribal law. It clearly was not contemplated at the time the Federal Judiciary Act was passed because Indians were not included within the scope of the diversity jurisdiction statute. See Part I.A.2 *infra*. The Rules of Decision Act has not been changed in any manner to provide for application of tribal law. *See* Hart and Wechsler's The Federal Courts and the Federal System, Bator, Mishkin, Shapiro & Wechsler, ed. 1973, p. 663. Nor is it likely that Congress would authorize federal courts to apply tribal law. Federal courts simply are not equipped to determine and apply the laws of hundreds of different tribes, and likely would not be interested in doing so.

those over $10,000—would be heard in federal court, while the less important cases would remain in tribal court. And as Indians increase their economic and commercial activities under federal law and policies which encourage such activities, *see e.g.,* Indian Financing Act, *supra,* an even greater number of cases would be brought in federal court, thus further undermining the authority of tribal courts. (The business of the federal courts would also be expanded considerably.)

In this case, a tribal court action is pending. For the federal court to now step in and usurp the function of the tribal court, would severely infringe on the self-government of the Blackfeet Tribe. There is no difference between the present action and the debt collection action in *Williams v. Lee, supra,* or *Kennerly v. District Court, supra,* which would change the nature of the infringement or make it less severe so as to warrant application of federal diversity jurisdiction.

Given the fundamental conflict between the federal diversity jurisdiction statute and the Rules of Decision Act on the one hand, and federal law providing for Indian immunity from state law and protection of tribal self-government on the other hand, the federal Indian protections are paramount unless Congress explicitly considered the conflict and decided to abrogate the protection for Indians. As the next sections will show, however, the federal diversity statute did not apply at all to Indians when it was enacted, and no subsequent amendments or other legislation made it applicable.

2. The Diversity Jurisdiction Statute By Its Terms Did Not Apply to Indians When Enacted.

Section 11 of the Federal Judiciary Act of 1789 provided for original jurisdiction in the district courts in

civil suits involving the citizens of different states. While the diversity statute has been amended a number of times, it has remained relatively unchanged in relevant part for almost two hundered years. The Rules of Decision Act requires the application of state substantive law to civil actions in federal court, including diversity cases. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). This Act, Section 34 of the Federal Judiciary Act, similary has remained unchanged for almost two hundred years.

At the time the Judiciary Act was passed, Indians were viewed, even more so than now, as separate nations to be dealt with in a government to government relationship. *See* S. Tyler, *A History of Indian Policy* 32-33 (Washington: GPO, 1973); Cohen at 62-127. The Indian tribes' political independence was well established from the earliest years of the formation of the Republic, and certainly at the time of the passage of the Judiciary Act. The Indians' separate status was recognized in the Constitution, U.S. Constitution Art. I, § 8, cl. 3; Art. I § 2, cl. 3, and recognized in treaties and legislation affecting Indians, *see generally* Cohen at 259-270. The Indians' separate status was also acknowledged judicially in early decisions of this Court, *see Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832). In particular, *Worcester* recognized the Indians' immunity from state law. Chief Justice Marshall stated:

> The Cherokee Nation . . . is a distinct community, occupying its own territory, . . . in which the laws of Georgia can have no force . . . but with the assent of the Cherokees themselves, or in conformity with treaties and with the Acts of Congress.

31 U.S. (6 Pet) at 560.[7]

---

[7] Iowa Mutual states that at the time *Worcester* was decided there was recognition that state law did not extend to

(Continued on following page)

Indeed Indians were not considered citizens of either the United States or the States in which they resided. *Elk v. Wilkins,* 112 U.S. 94 (1884). It was not until almost a hundred years after passage of the Judiciary Act that it was firmly established that Indians could become naturalized citizens. *Id.* at 103-106. Thus at the time of the enactment of the federal diversity jurisdiction statute, Indians did not come within the terms of the statute because they were not citizens and there was no established method by which they could become citizens. Congress was well aware of this fact.[8] Thus rather than intending the diversity jurisdiction statute to apply to Indians, it is clear that Congress intended to exclude them.

Because the diversity jurisdiction statute and Rules of Decision Act have remained virtually unchanged in relevant part, *see* Hart and Wechsler *supra* at 1050-51, nothing in these provisions has changed to make them applicable to

---

(Continued from previous page)

reservations *and* there were no tribal courts to resolve disputes between Indians and outsiders, leaving only federal courts to resolve such disputes. This is plainly not the case. The Cherokees, the Tribe involved in the *Worcester* case, had a sophisticated formal court system at the time *Worcester* was decided. See R. Strickland, Fire and the Spirits (Norman: University of Oklahoma Press, 1975). Thus if Congress had anything in mind when the Judiciary Act was passed, it would have been the more developed system of the Cherokee Tribe. While most other tribes did not have such formal courts, they did have traditional legal systems which operated to resolve disputes. Cohen at 229-232.

[8] The Indians' unique non-citizen status was acknowledged in the Constitution by the term "Indians not taxed," U.S. Const. art. I § 2 cl. 3. This term has been treated as describing non-citizen Indians. Elk v. Wilkins, 112 U.S. *supra* at 99 and 102; Goodluck v. Apache County, 417 F.Supp. 13, 16 (D. Ariz. 1975). Art. IX of the Articles of Confederation had also made it clear that Indians were not citizens of the states in which they resided. Art. IX gave Congress exclusive power over trade and affairs with "the Indians, not members of any of the States . . . ."

Indians. In order for the statute to apply to the present case, petitioners must therefore argue that by conferral of citizenship in the Act of June 2, 1924, 43 Stat. 253, (codified as carried forward at 8 U.S.C. § 1401(b)), Congress intended to alter or amend Indian immunity from state law and protection of tribal self-government.[9]

3. The Citizenship Act Did Not Alter or Amend Indian Immunity From State Law.

By its terms, the 1924 Act did not make the federal diversity statute and Rules of Decision Act applicable to Indians. Nor by its terms did it remove the Indians' immunity from state law or in any way reduce federal protection of tribal self-government. The 1924 Act merely states:

> That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided,* That the granting of any such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

The only way the federal diversity statute and Rules of Decision Act would be applicable is if the 1924 Act by implication removed the Indians' immunity from state law. But it has been held that the 1924 Act did not implicitly remove or reduce federal protection of Indians or in any way affect the federal-Indian relationship. *United States v. Wright,* 53 F.2d 300, 306 (4th Cir. 1931), *cert. denied* 285 U.S. 539 (1932). It also has been held that citizenship did not diminish the authority of tribes over their members or terminate tribal court systems. *Tom v. Sutton,* 533 F.2d 1101, 1103 n.1 (9th Cir. 1976); *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89, 98 (8th Cir. 1956); *Boyer v. Shoshone-Bannock Indian Tribes,* 441 P.2d 167, 170 (D. Idaho 1968).

[9] Many Indians did become naturalized citizens prior to 1924. Section 6 of the 1887 General Allotment Act in particular conferred citizenship on allotted Indians, Act of Feb. 8, 1887, 24 Stat. 388, 390, 25 U.S.C. § 349. Particular tribes were naturalized by treaty. Cohen at 643. Congress also conferred citizenship on World War I veterans. In this context, it makes even less sense that Congress intended the federal diversity jurisdiction statute to apply to Indians depending on their status as a member of a particular tribe, an allottee or a World War I veteran.

Prior to enactment of the 1924 Act, this Court also has held on a number of occasions that citizenship was not intended to remove federal protection of Indians. The Court in *United States v. Nice,* 241 U.S. 591, 601 (1916) said:

> Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection.

See Winton v. Amos, 255 U.S. 373, 392 (1921); *Bowling v. United States,* 233 U.S. 528, 534 (1914); *Hallowell v. United States,* 221 U.S. 317, 324 (1911); *Tiger v. Western Inv. Co.,* 221 U.S. 286, 315 (1911); *United States v. Celestine,* 215 U.S. 278, 288-291 (1909); *United States v. Holliday,* 70 U.S. (3 Wall.) 407, 418-420 (1866). These early cases dealt with citizenship acquired under section 6 of the General Allotment Act and other acts, but their holdings are equally instructive in construing the effect of the 1924 Act because they represent the state of the law and thus Congress' likely understanding at the time the 1924 Act was passed.

Conferral of citizenship has never been a factor in determining issues of Indian immunity from state law; issues of application of state law to Indians have been decided wholly independently from citizenship. The primary modern articulation of federal Indian immunity in *Williams v. Lee,* 358 U.S. 217 (1959) came well after conferral of citizenship in 1924. And certainly citizenship has not been a factor to authorize application of state law. *See Moe v.*

Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976).

If the 1924 Act did not remove Indian immunity from state law and federal protection of tribal self-government as a general matter, it is difficult to see how it can be interpreted as removing these protections for federal court diversity jurisdiction purposes. There is no indication from the statute or any surrounding circumstances that such a result was meant to be accomplished. The considered choice that *United States v. Dion, supra,* says is required in order to abrogate Indian immunity from state law and protection of tribal self-government is clearly missing in the 1924 Act.[10]

B. Application of the Diversity Jurisdiction Statute to Indians Conflicts With the Policy of Erie and Woods.

An additional reason why the federal diversity statute should not be applied is the resulting conflict with the policy of *Erie Railroad v. Tompkins,* 304 U.S. 64 (1938) and *Woods v. Interstate Realty Co.,* 337 U.S. 535 (1949). The policy of these cases requires that where one "is barred from recovery in the state court, he should likewise be barred in the federal court." *Woods supra* at 538. This policy is based on the principle that for "purposes of diversity jurisdiction a federal court is 'in effect, only another court of the State'," and is intended to discourage forum

[10] At most, the 1924 Act provided that individual Indians as citizens could avail themselves of the federal diversity statute. *See* Cohen *supra* at 317. But whether individuals can consent to the application of state law is not clear. *See* Kennerly v. District Court, *supra.* Tribes themselves apparently are unable to invoke diversity jurisdiction because they do not come within the terms of the statute. Standing Rock Sioux Tribe v. Dorgan, 505 F.2d 1135, 1140 (8th Cir. 1974); Oneida Indian Nation v. County of Oneida, 464 F.2d 916, 922-23 (2d Cir. 1972), *rev'd and remanded on other grounds,* 414 U.S. 661 (1974). *See also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

shopping and eliminate discrimination against citizens of the state where the federal court hearing the case sits. *Id.* at 537-38.

Federal diversity jurisdiction in cases involving reservation residents would allow a plaintiff to choose a federal forum where state substantive law must be applied, or a tribal forum where tribal law would be applied. This situation raises the very real possibility that the outcome of a case could vary depending on the court in which it is brought. This is precisely the situation which *Erie* sought to correct.

Secondly, federal diversity jurisdiction in cases involving reservation Indians discriminates against in-state residents. In-state residents would have to file in tribal court in order to obtain relief; out-of-state residents would have the option to by-pass tribal courts and file in federal court. This situaiton creates "discrimination against citizens of the state in favor of those authorized to invoke the diversity jurisdiction of the federal courts." *Woods supra* at 538. Application of the diversity jurisdiction statute to these kinds of cases thus creates the very inequities which *Erie* and *Woods* eliminated.

C. Perceived Local Prejudice Does Not Justify Abrogation of Indian Immunity From State Law or Protection of Tribal Self-Government.

Iowa Mutual argues that the historical reason for the diversity jurisdiction statute is to provide a forum free of local prejudice, and that this historical reason would be served by application of the diversity jurisdiction statute to reservation based claims. The historical basis for the statute, however, does not change the fact that application of the statute would invade Indian immunity from state law and diminish tribal self-government, results which can be authorized only by Congress. As we have shown, Congress

did not authorize these results. But if lack of a federal forum discourges commercial activity on the reservation, or inhibits Indians from becoming full participants in American society as petitioner argues, Congress can indeed make changes if it chooses. Until that time, the federal diversity jurisdiction statute is inapplicable to reservation based claims involving Indian defendants.

In any case, the historical basis for the diversity jurisdiction statute is unclear. *See* Wright, Law of Federal Courts 85-86 (1976). The need for the statute historically and presently has been and is controversial, *id.* at 87-92. And the justification that a federal forum free from local prejudice is necessary has been particularly criticized, *id.*

Amicus Blackfeet Tribe also points out that Iowa Mutual's fears of prejudice and concern about the competence of the tribal court have no basis in fact. Tribal judges need not be lawyers, just as many local, state and federal judges, including U.S. Supreme Court justices, need not be lawyers. Nor is there any evidence that judges who serve at the pleasure of a governing body are any more or less prejudiced than state court judges who serve at the pleasure of the electorate, or federal judges who are appointed because, among other reasons, they belong to a particular political party.

Iowa Mutual's statement that the Blackfeet Tribal Court cannot handle a case as complicated as the present one is also unfounded. The Blackfeet Tribal Court and other tribal courts handle far more complicated cases routinely. There is nothing particularly complicated by the present case which would put it outside the capabilities of the tribal court.

In short, if diversity jurisdiction is justified for reservation based claims for whatever reason, then Congress must be convinced, not this Court.

II. Federal Diversity Jurisdiction Is Limited Even If a Tribe Chooses Not to Exercise Its Exclusive Jurisdiction.

In its opinion below, the Ninth Circuit indicated that if the "tribe has not manifested an interest in adjudicating the dispute," federal diversity is "not divested," Pet. App. 5a, relying on its earlier decision in *R. J. Williams v. Fort Belknap Housing Auth., supra* at 983-84. *See Wecks Construction v. Oglala Sioux Housing Auth., supra* at 11. The Ninth Circuit's statement presumably is based on an assumption that there would be no infringement on tribal self-government. Both its assumption and conclusion are incorrect.

If the Tribal Court chooses not to exercise its jurisdiction,[11] state law still is not applicable. This is because in the class of cases involving Indian defendants and reservation-based claims, state law has been preempted by the federal treaties and statutes which leave this area to the Indians themselves regardless of whether there is any infringement on tribal self-government.[12] *McClanahan v. Arizona Tax Commission, supra* at 179-80; *Kennerly v. Dis-*

---

[11] The Blackfeet Tribal Court has determined that it has jurisdiction under its laws in the Tribal Court proceedings now pending. J.A. 33-42. This decision is subject to review by the Blackfeet Appeals Court and potentially by the federal district court under federal question jurisdiction.

[12] Of course, if a tribe, after considered decision, decides not to exercise certain types of jurisdiction for a particular reason, state jurisdiction may still infringe on tribal self-government. *See* Cohen at 351 ("A tribe's legislative jurisdiction over its own people and within its own territory must include the right not to legislate at all in an area, if self-government is to be meaningful.").

trict Court, supra. In addition, Public Law 280 serves as a barrier to state assumption of jurisdiction where the tribe has not consented to jurisdiction.

In such a case, a federal court sitting in diversity jurdiction therefore could not apply state law. Neither could it apply tribal law under the Rules of Decision Act, *see* discussion p. 10, n.6. While this may mean that there may be no forum in a particular case, any perceived inequity must be viewed against "the overriding federal and tribal interests in these circumstances." *Three Affiliated Tribes v. Wold Engineering*, 106 S.Ct. 2305, 2314 (1986).[13]

CONCLUSION

For the reasons stated, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

JEANNE S. WHITEING
Attorney at Law
2909 4th Street
Boulder, Colorado 80302
(303) 449-4926

PHILLIP E. ROY
DONALD G. KITTSON
Blackfeet Legal Department
P.O. Box 849
Browning, Montana 59417
(406) 338-7777
Attorneys for Amicus Curiae

September 1986

[13] A plaintiff in this type of case may have a claim in tribal court for denial of due process and equal protection under the 1968 Indian Civil Rights Act, 25 U.S.C. § 1302(8).

APPENDIX A

CIVIL ACTION
CHAPTER 2

Sec. 1 Jurisdiction:

The Tribal Court and the State shall have concurrent and not exclusive jurisdiction of all suits wherein the defendant is a member of the Tribe which is brought before the Courts. . . .

BLACKFEET TRIBAL LAW AND ORDER CODE
PREFACE

1. The Blackfeet Tribal Law and Order Code of 1967, as amended, is a Code written by the Blackfeet Tribe to be administered within the exterior boundaries of the Blackfeet Reservation of Montana, and under no conditions does the State of Montana have jurisdiction over this Code, and further that any portion now in the Blackfeet Tribal Law and Order Code of 1967, as amended, relating to concurrent jurisdiction with said State of Montana, be hereby deleted and such language shall be of no further force or effect.

(Adopted by Ordinance No. 44, Blackfeet Tribe, December 13, 1974).

No. 85-1589

In The

Supreme Court of the United States

October Term, 1985

IOWA MUTUAL INSURANCE COMPANY,
Petitioner,

v.

EDWARD M. LaPLANTE, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE NAVAJO NATION TRIBE OF INDIANS, CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, ARAPAHO TRIBE OF THE WIND RIVER RESERVATION, SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, AND SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION IN SUPPORT OF RESPONDENTS

Yvonne T. Knight
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760
Counsel of Record for all Amici

Harold A. Monteau
Tribal Legal Department
Confederated Salish and Kootenai Tribes of the Flathead Reservation
Box 258
Pablo, MT 59855
Counsel for the Confederated Salish and Kootenai Tribes of the Flathead Reservation

W. Richard West, Jr.
Fried, Frank, Harris, Shriver, and Jacobson
1001 Pennsylvania Ave., N.W.
Suite 800
Washington, DC 20004-2505
Counsel for the Shoshone Tribe of the Wind River Reservation

Claudeen Bates Arthur
and Bruce R. Greene
Navajo Nation Department of Justice
P. O. Drawer 2010
Window Rock, AZ 86515
Counsel for the Navajo Nation Tribe of Indians

Dale T. White
Fredericks and Pelcyger
The Canyon Center
1881 9th Street, Suite 216
Boulder, Co 80302
Counsel for the Arapho Tribe of the Wind River Reservation

Howard Funke
Ft. Hall Business Council
P. O. Box 306
Ft. Hall, ID 83203
Counsel for the Shoshone-Bannock Tribes of the Fort Hall Reservation

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE DIVERSITY STATUTE DOES NOT GRANT JURISDICTION OVER ACTIONS AGAINST INDIANS ARISING ON THE RESERVATION	4
A. Federal Diversity Jurisdiction Would Infringe Upon Tribal Rights of Self-Government Guaranteed By Federal Law	4
B. The Congressional Intent To Interfere With Tribal Jurisdiction Must Be Clear and Plain	5
C. The Requisite Clear And Plain Congressional Intent Is Not Envinced By The Diversity Statute's History	7
D. Withholding Diversity Jurisdiction Over Claims Subject To Tribal Jurisdiction Is Consistent With Established Federal Indian Policies	12
II. DIVERSITY JURISDICTION OVER RESERVATION-BASED CLAIMS BARRED FROM STATE COURT BY FEDERAL LAW DEFEATS THE PURPOSES OF THE ERIE DOCTRINE	13
III. IOWA MUTUAL'S CONTENTION THAT DIVERSITY JURISDICTION IS NOT CONTINGENT UPON APPLICATION OF THE INFRINGEMENT DOCTRINE LACKS ANY SUPPORT IN CASE LAW	15
A. Both The Eighth And Ninth Circuits Agree That The Infringement Doctrine Applies To Determine Diversity Jurisdiction	15

TABLE OF CONTENTS — Continued

Page(s)

B. Application Of The Infringement Doctrine Is Consistent With General Principles Governing The Law To Be Applied In Diversity Cases 19

IV. THE EXHAUSTION RULE ANNOUNCED IN *NATIONAL FARMERS UNION INS. CO. V. CROW TRIBE* SHOULD BE APPLIED WHERE APPROPRIATE IN DIVERSITY CASES 21

V. THE EXERCISE OF DIVERSITY JURISDICTION MAY BE BARRED BY THE PREEMPTION DOCTRINE, EVEN THOUGH THE TRIBE DOES NOT EXERCISE JURISDICTION OVER THE CLAIM 23

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Page(s)

American Indian Agr. Credit v. Fredericks, 551 F. Supp. 1020 (D. Colo. 1982) 18

American Indian National Bank v. Red Owl, 478 F.Supp. 302 (D.S.D. 1979) 17, 18

Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398 (1964) 19

Boyer v. Shoshone-Bannock Indian Tribes, 92 Idaho 257 (1968) 12

Bryan v. Itasca County, 426 U.S. 373 (1976) 5

Elk v. Wilkins. 112 U.S. 94 (1884) 10

Enrique v. Superior Court, 115 Ariz. 342, 565 P.2d 522 (Ct. App. 1977) 26

Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 14

Fisher v. District Court, 424 U.S. 382 (1976) 4, 12, 18, 27

Free v. Bland, 369 U.S. 663 (1962) 19

Hallowell v. United States, 221 U.S. 317 (1911) 11

Hanna v. Plumer, 380 U.S. 460 (1965) 13

Hinderlider v. La Plata River Co., 304 U.S. 92 (1938) 20

Hot Oil Service, Inc. v. Hall, 366 F.2d 295 (9th Cir. 1966) 16

Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956) 11

Kelly v. Kosuga, 358 U.S. 516 (1959) 19

Kennerly v. District Court of Montana, 400 U.S. 423 (1971) 4, 24, 25, 26

Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co., 361 U.S. 95 (1962) 20

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 6

Marchie Tiger v. Western Invest. Co., 221 U.S. 286 (1911) 11

Mattz v. Arnett, 412 U.S. 481 (1973) 5

McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164 (1973) 4, 24, 25, 26

McKnett v. St. Louis & San Francisco Railway Co., 292 U.S. 230 (1934) 21

Mondou v. N.Y., N.H., & H.R. Co., 223 U.S. 1 (1912) 21

Morton v. Mancari, 417 U.S. 535 (1974) 12

National Farmer's Union Ins. Co. v. Crow Tribe, 471 U.S. —, 85 L.Ed.2d 818 (1985) 3, 20, 21, 22

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 20

Oneida v. Oneida Indian Nation, 470 U.S. —, 84 L.Ed.2d 169 (1985) 20

Paul v. Chilsoquie, 70 F. 401 (C.C.D. Ind. 1895) 10

Poitra v. DeMarrias, 502 F.2d 23 (8th Cir. 1974) 13, 15, 16, 17, 18

Prima Paint Corporation v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 19

R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983) 15, 16, 18, 23, 26

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1977) 5, 6, 12

Sola Electric Co. v. Jefferson, 317 U.S. 173 (1942) 19

TABLE OF AUTHORITIES—Continued

Page(s)

Superior Oil Co. v. Merritt, 619 F.Supp. 526 (D.C. Utah 1985) 8

Testa v. Katt, 330 U.S. 386 (1947) 21

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138 (1984) 17, 24, 27

Three Affiliated Tribes v. Wold Engineering. 476 U.S. —, 90 L.Ed.2d 881 (1986) 17, 24

United States v. Celestine, 215 U.S. 278 (1909) 11

United States v. Dion, 476 U.S. —, 90 L.Ed.2d 767 (1986) 5

United States v. Holliday, 3 U.S. (Wall) 407 (1866) 7, 11

United States v. Kagama, 118 U.S. 375 (1886) 9

United States v. Nice. 241 U.S. 591 (1916) 10

United States v. Quiver, 241 U.S. 602 (1916) 12

United States v. Sandoval, 231 U.S. 28 (1913) 11

United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941) 5, 20

Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957) 17

Weeks Construction, Inc. v. Oglala Sioux Housing Authority, Nos. 85-5129 and 85-5130 (8th Cir. July 29, 1986) 18

Williams v. Lee. 358 U.S. 219 (1959) 3, 4, 15, 16, 18, 24, 28

Winton v. Amos, 255 U.S. 373 (1921) 11

Woods v. Interstate Realty, 337 U.S. 535 (1949) 13

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 8

Yiatchos v. Yiatchos, 376 U.S. 306 (1964) 20

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTION

U.S. Const., Art. I, § 8, cl. 3 (Commerce Clause) 8
U.S. Const., Art. VI, cl. 2 (Supremacy Clause) 19

STATUTES

Act of 1789, ch. 20 § 11, 1 Stat. 73 (Judiciary Act) 7, 8, 9
Act of 1887, ch. 119, § 6, 24 Stat. 388, 25 U.S.C. § 349 (Dawes Act) 9
Act of August 9, 1888, ch. 818, § 2, 25 Stat. 392, 25 U.S.C. § 182 10
Act of 1906, ch. 2348, § 6, 34 Stat. 182, 25 U.S.C. § 349 10
Act of November 6, 1919, ch. 95, 41 Stat. 350 10
Act of June 2, 1924, ch. 233, 43 Stat. 253 ..... 10, 11
Act of April 20, 1940, ch. 117, 54 Stat. 143 8
Act of June 25, 1948, ch. 646, 62 Stat. 869 8
Act of July 26, 1956, ch. 740, 70 Stat. 658 8
Act of July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415 ... 8
Act of August 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445 8
Act of 1968, 25 U.S.C. § 1302 (Indian Civil Rights Act) 5
Act of October 21, 1976, Pub.L. 94-583, § 3, 90 Stat. 2891 8
Diversity. Statute, 28 U.S.C. § 1332 7
Pub.L. 280, 25 U.S.C. §§ 1321-26 ..... 16, 25
Rules of Decision Act, 28 U.S.C. § 1652 ..... 14, 19

TABLE OF AUTHORITIES—Continued

Page(s)

MISCELLANEOUS

25 CFR § 11.22 1
F. Cohen, Handbook of Federal Indian Law (1982) 9, 14, 26
Confederated Salish and Kootenai Law and Order Code, Chapter II, § 1 1
Law and Order Code of the Shoshone-Bannock Tribes, §§ 2(b) and 2.1 1
Moore's Federal Practice ¶ 707.1 (2d ed. 1981) 7
IA Moore's Federal Practice (Part 2), ¶ 0.324 (1985) 19
7 Navajo Tribal Code § 253(2) and (4) 1
7 Williston on Contracts § 914 (1963) 27

INTEREST OF AMICI CURIAE

Amici, Navajo Nation Tribe of Indians, Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, Arapaho Tribe of the Wind River Reservation, Shoshone Tribe of the the Wind River Indian Reservation, and Shoshone-Bannock Tribes of the Fort Hall Reservation are all federally recognized Indian tribes with well-established legal systems, including tribal courts, operating within their respective reservations. Amici all assert civil jurisdiction over claims arising within their respective reservations, including claims by or against non-members. *See*, 7 Navajo Tribal Code § 253(2) and (4); Law and Order Code of the Shoshone-Bannock Tribes §§ 2(b) and 2.1; Confederated Salish and Kootenai Law and Order Code, Chapter II, § 1; 25 CFR § 11.22 establishing Civil jurisdiction of the Courts of Indian Offenses serving the Wind River Indian Reservation (jurisdiction asserted over non-member defendants by consent of parties).

Resolution of the question presented in this case will have broad impact. This case will define the jurisdictional relationship between federal courts in diversity cases and tribal courts concerning claims within tribal jurisdiction under federal treaties and statutes. Specifically, it will determine whether the diversity statute empowers federal courts to intrude upon the jurisdiction of tribal courts in instances in which state jurisdiction would be barred by judicially fashioned doctrines implementing treaties and statutes protecting tribal self-government. Amici have a substantial interest in protecting their rights to be self-governing from diminishment through the intrusion of outside governments, whether state or federal. Hence,

amici submit this brief in support of respondents' position and urge this Court to construe the diversity statute in accordance with longstanding federal policies protective of tribal self-government.

———o———

SUMMARY OF ARGUMENT

1. The plain language of the diversity statute, the legislative history and surrounding circumstances do not reveal the requisite clear and plain congressional intent to empower federal courts to intrude upon the jurisdiction of tribal courts guaranteed by federal treaties and statutes. The conferral of federal and state citizenship upon Inidans does not envince a contrary congressional intent.

2. Construing the diversity statute to provide a federal forum for claims otherwise within the exclusive jurisdiction of Indian tribes defeats the policies of the Erie Doctrine. Similar claims would be subject to different results depending upon whether the claimant were an in-state resident filing in tribal court or an out-of-state resident filing in federal court. Moreover, such a construction enables out-of-state claimants to forum-shop between tribal and federal forums.

3. Both the Ninth Circuit and the Eighth Circuit agree that federal diversity jurisdiction over claims subject to tribal jurisdiction is barred in any instance in which the exercise of such jurisdiction would infringe upon tribal self-government. The alleged conflict between these two circuits as to this rule is illusory as confirmed by a recent decision of the Eighth Circuit issued after this Court granted certiorari in this case.

Moreover, well-established principles governing the substantive rule of decision in diversity cases require that federal law be applied to determine federal questions. The extent of federal and tribal jurisdiction are matters governed by federal law. Thus, when questions as to these matters are raised in a diversity case, the federal court must apply applicable federal law, including the infringement doctrine announced in *Williams v. Lee*, 358 U.S. 219 (1959) and the federal preemption doctrine.

4. In *National Farmers Ins. Co. v. Crow Tribe*, 471 U.S. —, 85 L.Ed.2d 818 (1985), this Court announced the rule that exhaustion of tribal remedies is required before federal courts will address federal questions concerning the nature and extent of tribal jurisdiction. Although that case was based upon federal question jurisdiction, the rule should also apply when such federal questions are raised in diversity cases.

Assuming that this Court rules that federal diversity jurisdiction is limited by the infringement doctrine, Iowa Mutual concedes that, under that doctrine, Montana courts would have no jurisdiction over the claim raised herein. There being no question raised as to the Blackfeet Tribe's jurisdiction over the claim, the federal court should simply dismiss this case for lack of jurisdiction.

5. The Ninth Circuit's opinion in this case in dictum adopts a rule that would provide a federal forum under diversity jurisdiction over any claim within a tribe's jurisdiction, but for which the tribe does not provide a forum. The rule is grounded upon the notion that where there is no tribal forum, a federal forum would not infringe upon tribal self-government. However, this rule is unsound

because it fails to recognize that under the federal preemption doctrine, where federal treaties and statutes reserve exclusive jurisdiction in a tribe, state and federal jurisdiction are precluded, notwithstanding that a tribe has not provided a forum for all claims that may arise within its jurisdiction. Amici submit that, should this Court affirm the Ninth Circuit's decision, the affirming opinion should expressly indicate disapproval of the aforediscussed rule.

———o———

ARGUMENT

I. THE DIVERSITY STATUTE DOES NOT GRANT JURISDICTION OVER ACTIONS AGAINST INDIANS ARISING ON THE RESERVATION

A. Federal Diversity Jurisdiction Would Infringe Upon Tribal Rights of Self-Government Guaranteed By Federal Law

Petitioner Iowa Mutual Insurance Company (hereinafter "Iowa Mutual") concedes that Montana courts have no jurisdiction over its claim because such jurisdiction would infringe upon tribal self-government. *See, Petitioners Brief* at 5 and 7. And indeed, it is well settled that tribal Indians have a federal right to make their own laws and be governed by them. *See, e.g., Williams v. Lee,* 358 U.S. 217, 223 (1959); *McClanahan v. Arizona State Tax Comm'n.,* 411 U.S. 164 (1973). Accordingly, tribal courts have exclusive jurisdiction over civil actions arising on the reservation where the defendant is a tribal member. *See, e.g., Williams v. Lee,* 358 U.S. at 233; *Kennerly v. District Court of Montana,* 400 U.S. 423, 427-30 (1971); *Fisher v. District Court* 424 U.S. 382, 389 (1976). The diversity statute would conflict with tribal jurisdiction by providing a federal forum for such actions.

This Court has previously recognized that construing a federal statute to provide a federal forum for issues otherwise within tribal jurisdiction

> "constitutes an interference with tribal autonomy and self-government. . . . Even in matters involving commercial and domestic relations, we have recognized that "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves" [citation omitted] may "undermine the authority of the tribal cour[t] . . . and hence . . . infringe on the right of Indians to govern themselves." [citation omitted]

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59-60 (1977). In *Santa Clara Pueblo,* this Court declined to construe the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302, to provide a federal forum for the resolution of issues arising under that Act.

B. The Congressional Intent To Interfere With Tribal Jurisdiction Must Be Clear and Plain

A determination of whether the diversity statute, as a general federal statute, applies to permit federal courts to intrude upon the jurisdiction of tribal courts turns on the intent of Congress. *Bryan v. Itasca County,* 426 U.S. 373, 393 (1976), citing *Mattz v. Arnett,* 412 U.S. 481, 504-505 (1973), *United States v. Dion,* 476 U.S. —, 90 L.Ed.2d 767 (1986). A congressional intent to abrogate federal rights granted to Indians must be "clear and plain." *United States v. Dion,* 90 L.Ed.2d at 773; *United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339, 353 (1941). The standard for determining the "clear and plain" intent of Congress has varied. As explained in *United States v. Dion,* 90 L.Ed.2d at 774:

We have enunciated . . . different standards over the years for determining how such a clear and plain intent must be demonstrated. In some cases, we have required that Congress make "express declaration" of its intent to abrogate treaty rights. [Citations omitted.] In other cases, we have looked to the statute's "'legislative history'" and "'surrounding circumstances'" as well as to "'the face of the Act.'" [Citations omitted.] Explicit statement by Congress is preferable for the purpose of ensuring legislative accountability for the abrogation of treaty rights. [Citation omitted.] We have not rigidly interpreted that preference, however, as a per se rule; where the evidence of congressional intent to abrogate is sufficiently compelling, "the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute." [Citation omitted.] What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.

Moreover, the requirement that the congressional intent to authorize an intrusion upon tribal sovereignty be clear and plain is especially compelling when it is contended that federal courts are empowered to intrude upon the jurisdiction of tribal courts. This Court emphasized in *Santa Clara Pueblo v. Martinez,* that a construction of the Indian Civil Rights Act not to provide a federal forum was consistent with the longstanding recognition that judicial restraint is particularly appropriate in the area of Indian affairs, and that the federal courts will require Congress to make clear any "intention to permit the . . . intrusion on tribal sovereignty that adjudication of . . . actions [within tribal court jurisdiction] in a federal forum would represent. . . ." 436 U.S. at 72; *see also, Lone Wolf v. Hitchcock,* 187 U.S. 553, 565 (1903); *United States v. Holliday,* 3 U.S. (Wall) 407, 418-420 (1866).

C. The Requisite Clear And Plain Congressional Intent Is Not Envinced By The Diversity Statute's History

The history of the diversity statute falls far short of manifesting the requisite clear and plain congressional intent to vest federal courts with diversity jurisdiction to adjudicate the merits of reservation-based claims against tribal members.

The diversity statute, 28 U.S.C. § 1332, was originally enacted as section 11 of the Judiciary Act of 1789. *See,* Judiciary Act, ch. 20 § 11, 1 Stat. 73, 78-79 (1789).[1] The historical purpose of the diversity statute was to permit civil actions between "citizens of different states" to be brought in a neutral federal forum. To be a citizen of a state within the meaning of the diversity statute, a person must be both a citizen of the United States and a domiciliary of a state. This was the rule before and after the adoption of the Fourteenth Amendment. *See* 1 J. Moore, W. Taggert & J. Wicker, *Moore's Federal Practice* ¶ 707.1 (2d ed. 1981).

The diversity statute on its face as originally enacted and as presently constituted, makes "no mention of In-

---

[1]The original act states that "the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars . . . and the suit is between a citizen of the state where the suit is brought, and a citizen of another state." 1 Stat. 73 at 78.

dians and it is unlikely that Congress had the future status of Indian tribes in mind when it passed the statute." *Superior Oil Co. v. Merritt,* 619 F.Supp. 526, 533 (D.C. Utah 1985).[2] Thus, there is no "express declaration" by Congress in the diversity statute authorizing federal courts to assume diversity jurisdiction over claims subject to the exclusive jurisdiction of Indian tribes.

Moreover, the circumstances surrounding the passage of the diversity statute show that when the statute was passed, tribes and their members were viewed as a people separate and distinct from states both politically and territorially.

The United States Constitution was ratified in 1787, two years prior to the Judiciary Act. The Constitution contains the Commerce Clause which gives Congress exclusive federal authority in the area of Indian affairs. *U.S.Const.* Art. I, § 8, cl. 3. The Commerce Clause empowers Congress to "regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes." This clause clearly reflects the prevailing view that tribes were considered as separate entities from states.

This view of the separateness of Indian tribes is also reflected in two early landmark decisions of this Court. In *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832), this

---

[2]Also the Amendments make no mention of Indians, tribes or Indian reservations. *See,* Act of April 20, 1940, ch. 117, 54 Stat. 143; Act of June 25, 1948, ch. 646, 62 Stat. 869; Act of July 26, 1956, ch. 740, 70 Stat. 658; Act of July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Act of August 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445; Act of October 21, 1976, Pub.L. 94-583, § 3, 90 Stat. 2891.

Court held that Georgia's laws do not apply within the Cherokee reservation:

> From the commencement of our government, Congress has passed acts to regulate trade and intercourse with Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive. . . .

Id. at 556-557.

In addition, in *United States v. Kagama,* 118 U.S. 375 (1886), this court held that tribes

> were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as Nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

Id. at 381-382.

Indeed, at the time the Judiciary Act was passed in 1789, Indians were not citizens of the United States unless they were naturalized individually or collectively by federal statute or treaty.[3] In 1884, shortly after the passage

---

[3]*See, generally,* F. Cohen, *Handbook of Federal Indian Law* 142-143 (1982). A few tribes were granted citizenship by special statute. The Dawes Act of 1887, ch. 119, § 6, 24 Stat. 388, 390, 25 U.S.C. § 349, also granted citizenship to allottees under

(Continued on following page)

of the Fourteenth Amendment, this Court held that Indians were not made citizens of the United States by the Fourteenth Amendment because they were not subject to the jurisdiction of the United States. *Elk v. Wilkins,* 112 U.S. 94 (1884). Thus, it was early held that, since tribal Indians were not citizens within the meaning of the Fourteenth Amendment, they could not invoke the diversity jurisdiction of the federal courts. *Paul v. Chilsoquie,* 70 F. 401, 402 (C.C.D. Ind. 1895).

Indians who were not yet United States citizens were made citizens by the Act of June 2, 1924, ch. 233, 43 Stat. 253, which provides that

> all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States; *Provided,* That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

Significantly, however, Congress enacted the 1924 Act against a backdrop of Supreme Court decisions that conclusively established that the conferral of citizenship *per se* did not abrogate tribal sovereignty or the plenary power of Congress over Indians. In *United States v. Nice,* 241 U.S. 591 (1916), the Court upheld a statute prohibiting sale of liquor to Indians on a reservation and rejected *inter alia*

(Continued from previous page)

that Act. This was amended by the Burke Act of 1906, ch. 2348, § 6, 34 Stat. 182, 25 U.S.C. § 349, which granted citizenship only to those Indians who received a patent in fee. The Act of August 9, 1888, ch. 818, § 2, 25 Stat. 392, 25 U.S.C. § 182, granted citizenship to Indian women who married white men. The Act of November 6, 1919, ch. 95, 41 Stat. 350, granted citizenship to Indians who served in the armed forces during World War I.

the argument that the grant of citizenship to Indians who took allotments under the General Allotment Act was incompatible with tribal existence and federal guardianship. The Court said:

> Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection.

Id. at 598. Accord; *United States v. Holliday,* 3 U.S. (Wall) 407, 418-420 (1866); *United States v. Celestine,* 215 U.S. 278, 288-291 (1909); *Hallowell v. United States,* 221 U.S. 317, 322-325 (1911); *Marchie Tiger v. Western Invest. Co.,* 221 U.S. 286, 310-316 (1911); *United States v. Sandoval,* 231 U.S. 28, 48 (1913); *Winton v. Amos,* 255 U.S. 373, 391-392 (1921).

Thus if Congress had intended to disturb the pre-existing rights of tribal Indians or the federal relationship with tribes, it would undoubtedly have said so expressly in the 1924 Act since the mere conferral of citizenship would not have had that effect.

Accordingly, in *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89, 98 (8th Cir. 1956), the court held:

> That Congress did not intend by the granting of citizenship to all Indians born in the United States to terminate the Indian Tribal Court system is patent from the fact that at the same session of Congress and at sessions continuouly [sic] subsequent thereto funds have been appropriated for the maintenance of the Indian Tribal Courts. We hold that the granting of citizenship in itself did not destroy tribal existence or the existence or jurisdiction of the Indian Tribal courts and that there was no intention on the part of Congress so to do.

Accord, Boyer v. Shoshone-Bannock Indian Tribes, 92 Idaho 257, 260 (1968) ("[T]he fact that all Indians are now citizens does not affect the jurisdiction of tribal courts.")

In summary, the evidence is far from clear that Congress in enacting the diversity statutes intended to authorize federal courts to intrude upon the jurisdiction of tribal courts exercised under the protection of federal treaties and statutes. Hence, this Court should find that the diversity statutes does not grant federal jurisdiction over claims against Indians arising within an Indian reservation.

D. Withholding Diversity Jurisdiction Over Claims Subject To Tribal Jurisdiction Is Consistent With Established Federal Indian Policies

Furthermore, construction of the diversity statute to preclude federal jurisdiction over claims against Indians arising on the reservation is consistent with the well established "federal policy of furthering Indian self-government." *Santa Clara Pueblo v. Martinez,* 436 U.S. at 62; quoting *Morton v. Mancari,* 417 U.S. 535, 551 (1974); and *see, Fisher v. District Court,* 424 U.S. 382, 391 (1976). This Court has said that general federal statutes must be construed "in accord with the policy reflected by the legislation of Congress and its administration for many years. . . ." *United States v. Quiver,* 241 U.S. 602, 606 (1916) (holding that federal penal code applicable to federal enclaves does not apply to Indian reservations).

II. DIVERSITY JURISDICTION OVER RESERVATION-BASED CLAIMS BARRED FROM STATE COURT BY FEDERAL LAW DEFEATS THE PURPOSES OF THE ERIE DOCTRINE

Iowa Mutual argues that the policies underlying the Erie Doctrine are not abridged by the exercise of federal diversity jurisdiction over reservation-based claims against Indians barred from state court by the infringement and preemption doctrines. *See, Petitioner's Brief* at 5-7; and *Petition for a Writ of Certiorari,* at 9. The purposes of the Erie Doctrine are to avoid the inequitable administration of laws and to discourage forum shopping. *Hanna v. Plumer,* 380 U.S. 460, 468 (1965). Contrary to Iowa Mutual's contention, those policies would be defeated by approving the exercise of diversity jurisdiction over claims barred from state court.

First, the exercise of diversity jurisdiction over reservation-based claims barred from state courts reinstates the problem of inequitable administration of the laws. Claims of in-state claimants would be restricted to a tribal forum applying tribal law while similar claims of out-of-state claimants could be brought in a federal forum applying state law.[4] Thus there is a strong possibility that the same claim would be subject to different results depending upon whether the claimant were an in-state or out-of-state resident. As stated in *Woods v. Interstate Realty,* 337 U.S. 535, 538 (1949):

---

[4]Iowa Mutual states that Poitra v. DeMarrias, 502 F.2d 23 (8th Cir. 1974) sets forth "the correct view of the question presented in this case." *See,* Petition for Writ of Certiorari at 9. Since the Poitra court applied state law in determining the claim raised in that case, it may be assumed that Iowa Mutual takes the position that state law provides the rule of decision in diversity cases.

> [W]here in [diversity] cases one is barred from recovery in the state court, he should likewise be barred in the federal court. The contrary result would create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that Erie R. Co. v. Tompkins was designed to eliminate.

Second, the exercise of diversity jurisdiction over reservation-based claims barred from state courts would allow an out-of-state claimant the choice of bringing an action in federal court where state law would be applied and bringing an action in tribal court where tribal law would be applied. Such a situation plainly reinstitutes the problem of forum shopping which the Erie Doctrine was intended to discourage, even though the forums involved are federal and tribal, rather than federal and state.

Clearly, petitioner's contention that federal diversity jurisdiction over the claim in this case is consistent with the policies underlying the Erie Doctrine cannot stand.[5]

---

[5]If, on the other hand, petitioner is arguing that tribal law would provide the rule of decision in an appropriate case, such as the instant case where the tribal court has exclusive jurisdiction, that contention raises its own set of problems. The principal difficulty inherent in this contention is summarized in F. Cohen *Handbook of Federal Indian Law, supra* at 317-318 n.291:

> Applying tribal law, as a tribal court would, is unprecedented and clashes with the Rules of Decision Act, 28 U.S.C. § 1652, as interpreted in Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

III. IOWA MUTUAL'S CONTENTION THAT DIVERSITY JURISDICTION IS NOT CONTINGENT UPON APPLICATION OF THE INFRINGEMENT DOCTRINE LACKS ANY SUPPORT IN CASELAW.

Iowa Mutual contends that this Court should hold that federal courts in diversity cases may exercise jurisdiction over reservation-based claims against Indians notwithstanding that the exercise of such jurisdiction by state courts would be barred by application of the infringement doctrine announced in *Williams v. Lee,* 358 U.S. 217 (1959). Iowa Mutual also contends that there is a conflict between the Eighth and Ninth Circuits as to the correctness of its position. In this part of the brief, amici will demonstrate that Iowa Mutual's position lacks support in both the Eighth and Ninth Circuits, and that application of the infringement doctrine to determine diversity jurisdiction over claims against Indians arising on a reservation is consistent with general principles governing what law applies in diversity cases.

A. Both The Eighth And Ninth Circuits Agree That The Infringement Doctrine Applies To Determine Diversity Jurisdiction

Iowa Mutual asserts that there is a conflict between the Ninth Circuit's decision in *R. J. Williams Co. v. Fort Belknap Housing Authority,* 719 F.2d 979 (9th Cir. 1983), on which this case relies, and the Eighth Circuit's decision in *Poitra v. DeMarrias,* 502 F.2d 23 (8th Cir. 1974). Amici, however, agree with the respondent LaPlante, that the alleged conflict is illusory. A careful examination of the *Poitra* decision reveals that the Eighth Circuit, like the Ninth Circuit, adopts the rule that a federal court in diversity cases may exercise jurisdiction over reservation-

based claims against tribal members *unless* such action would interfere with tribal self-government. *Poitra,* 502 F.2d at 28-29; *R. J. Williams,* 719 F.2d at 983-984.

The *Poitra* court expressly approved the Ninth Circuit's decisions in *Hot Oil Service, Inc. v. Hall,* 366 F.2d 295 (9th Cir. 1966); and *Littell v. Nakai,* 344 F.2d 486 (9th Cir. 1965). In each of those cases, the Ninth Circuit held that it had no diversity jurisdiction over a reservation-based claim against an Indian because the exercise of such jurisdiction would interfere with tribal self-government. *Poitra,* 502 F.2d at 28-29. The *Poitra* court, however, distinguished those cases, *inter alia,* on the ground that the claims involved tribal lands and a contract with the tribal government, whereas *Poitra* involved private litigants and a private dispute. *Poitra,* 502 F.2d at 29. Plainly, the *Poitra* court applied the infringement doctrine to determine whether it had diversity jurisdiction over the claim.

However, confusion resulted from the *Poitra* decision because the Eighth Circuit based the decision on two apparently inconsistent findings. First, the Eighth Circuit found that, on the facts of *Poitra,* diversity jurisdiction would not infringe on tribal self-government. And second, the Court found that North Dakota's door-closing statute implemented a federal statute—Pub.L. 280, 25 U.S.C. § 1322(a), and hence, was not a state law or policy which the Erie Doctrine requires federal courts sitting in diversity to follow. The Court, however, failed to explain in express terms why it was bound to apply the federal infringement doctrine announced by this Court in *Williams v. Lee,* 358

U.S. 217 (1959),[6] but not the terms of a federal statute, Pub. L. 280.

The failure of *Poitra* Court to explain this apparent inconsistency, coupled with the lack of specific language in the opinion expressly finding that federal diversity jurisdiction is contingent upon a finding of non-infringement of tribal self-goverment, resulted in an erroneous decision by the federal district court in *American Indian National Bank v. Red Owl,* 478 F.Supp. 302 (D.S.D. 1979). The *Red Owl* court, construed *Poitra* to mean that a federal court in diversity cases is not obligated to apply the federal infringement doctrine because it is not a state policy.

Petitioner Iowa Mutual now relies upon the *Red Owl* court's erroneous interpretation of *Poitra* for its contention that there is a conflict between the Eighth and Ninth Circuits as to whether the infringement doctrine applies in determining whether diversity jurisdiction may be exercised in this case.

Any doubt as to the Eighth Circuit's view of the applicability of the infringement doctrine to determine the propriety of diversity jurisdiction was laid to rest by that

---

[6]It may be inferred that the Poitra Court erroneously viewed P.L. 280 as offering an option to North Dakota to disclaim jurisdiction over the claims in question. That view is consistent with the then erroneous view of North Dakota courts that the state had preexisting jurisdiction over such claims. *See,* Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957). The Vermillion decision was determined to be wrong in two recent cases in this Court. *See,* Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138, 148 (1984); Three Affiliated Tribes v. Wold Engineering, 476 U.S. —, 90 L.Ed.2d 881, 887 (1986). Hence, North Dakota's legislative action pursuant to the P.L. 280 offer implemented what the Poitra court viewed as an optional federal policy. In contrast, the infringement doctrine is not optional.

Court's recent decision in *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, Nos. 85-5129 and 85-5130 (8th Cir. July 29, 1986). In *Weeks*, the Eighth Circuit confirmed its view that the infringement doctrine applies in determining its diversity jurisdiction over reservation-based claims by non-Indians against Indians. *See, Weeks*, slip op. at 9-10.[7]

Thus, Iowa Mutual's arguments that the infringement doctrine announced in *Williams v. Lee* should not be applied by federal courts in determining whether to exercise diversity jurisdiction over reservation-based claims against Indians finds no support in the decisions of the Eighth Circuit. The only support for that argument is the misconstruction of *Poitra* in the *Red Owl* case.[8]

---

[7]The Co... avoided the question of whether Poitra was wrong in determining that diversity jurisdiction may be exercised over a claim between tribal members arising on the reservation. The Court suggested that the unique facts of that case would support a finding of non-infringement. *See*, Weeks, slip op. at 10 n.7. Amici submit that Poitra was wrong by application of the preemption doctrine. Tribes have exclusive jurisdiction over such claims between tribal members under federal treaties and statutes. *See, e.g.*, Fisher v. District Court, 424 U.S. 382 (1976). And *see* the discussion in part V of this Brief, *infra*.

[8]Any argument that the infringement doctrine does not preclude diversity jurisdiction over reservation-based private disputes between non-Indians and Indians is plainly unsound. *See*, Williams v. Lee, 358 U.S. 217 (1959); R. J. Williams, 719 F.2d 979 (9th Cir. 1983); Weeks, Nos. 85-5129 and 85-5130 (8th Cir. July 29, 1986). However, at least one district court relying on the Poitra decision has erroneously held that diversity jurisdiction over such claims does not infringe on tribal self-government. American Indian Agr. Credit v. Fredericks, 551 F.Supp. 1020, 1021-1022 (D. Colo. 1982).

B. Application Of The Infringement Doctrine Is Consistent With General Principles Governing The Law To Be Applied In Diversity Cases

Iowa Mutual's contention that a "judicially announced policy," i.e. the infringement doctrine, cannot bar diversity jurisdiction over reservation-based claims against Indians, *see*, Petitioner's Brief at 6, finds no support in general principles delineating the law to be applied in diversity cases.

The Rules of Decision Act, 28 U.S.C. § 1652, requires that state substantive law be regarded as the rule of decision in federal courts in diversity cases "except where the Constitution or treaties of the Uited States or Acts of Congress otherwise require or provide. . . ." This Court has construed this Act to mean that federal law provides the substantive rule of decision in diversity cases "with respect to subject matter over which Congress plainly has power to legislate." *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967); *Kelly v. Kosuga*, 358 U.S. 516, 519 (1959); and *see, generally*, IA *Moore's Federal Practice (Part 2)*, ¶ 0.324 (1985). It is thus well-established that the application of federal law in diversity cases is consistent with the Erie Doctrine where the subject matter is federal in nature. *See, e.g., Sola Electric Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942); *Kelly v. Kosuga*, 358 U.S. at 519.

Moreover, the federal law, which is binding on federal and state courts by force of the Supremacy Clause of the United States Constitution, Article VI, cl. 2, is not limited to statutes and treaties, but includes judicial decisions which comprise the federal common law. *See, e.g., Free v. Bland*, 369 U.S. 663, 668 (1962); *Banco Nacional De Cuba v. Sab-*

batino, 376 U.S. 398, 421-427 (1964); *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964); *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 361 U.S. 95 (1962); *Hinderlider v. LaPlata River Co.*, 304 U.S. 92, 110 (1938).

This Court has determined in a number of cases that federal common law applies to determine the rights of Indian tribes. *See e.g., Oneida v. Oneida Indian Nation*, 470 U.S. —, 84 L.Ed.2d 169, 179 (1985) (tribal right to sue to enforce aboriginal land rights); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-667 (1974) (tribal right to sue for possession of land); *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941) (tribal right to sue trespassers for accounting); *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. —, 85 L.Ed.2d 818, 824-825 (1985) (the extent of tribal judicial jurisdiction over non-Indian tortfeasor).

Especially relevant to the question in this case is this Court's recent decision in *National Farmer's Union Ins. Co. v. Crow Tribe*. In that case, it was held that the extent of a tribe's judicial jurisdiction over a non-Indian tortfeasor where the tort occurred within the reservation presents a federal question:

> [T]he power of the Federal Government over the Indian tribes is plenary. Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial, and political rights of the Indian tribes.

85 L.Ed.2d at 824; *accord; Oneida v. Oneida Indian Nation*, 84 L.Ed.2d at 179.

Indeed, this Court has said that the policy adopted by Congress in those areas within Congress' legislative

authority under the Constitution is as much the policy of states as if the law had emanated from the states' own legislatures. In *Testa v. Katt*, 330 U.S. 386, 392 (1947), this Court soundly rejected the contention that Connecticut courts could decline to enforce federal statutory rights deemed contrary to Connecticut policy:

> The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.

Id. at 392; *accord, McKnett v. St. Louis & San Francisco Railway Co.*, 292 U.S. 230, 234 (1934); *Mondou v. N.Y., & H.R. Co.*, 223 U.S. 1 (1912).

Thus, general principles governing the law to be applied by federal courts in diversity cases require that the federal infringement doctrine be applied to determine whether diversity jurisdiction may be exercised over a reservation-based claim against an Indian.

IV. THE EXHAUSTION RULE ANNOUNCED IN NATIONAL FARMERS UNION INS. CO V. CROW TRIBE SHOULD BE APPLIED WHERE APPROPRIATE IN DIVERSITY CASES

Amici urge this Court to affirm the Ninth Circuit's decision that federal courts in diversity cases are, like state

courts, barred from asserting jurisdiction over a claim when such assertion would infringe on tribal self-government. Assuming this Court affirms that decision, the holding in *National Farmer's Union Ins. Co. v. Crow Tribe*, 471 U.S. —, 85 L.Ed.2d 818 (1985), should then apply where a question is raised concerning the extent of tribal jurisdiction over the claim in question.

In *National Farmers Union*, this Court ruled that federal questions concerning the nature and extent of tribal court jurisdiction must be referred to the tribal court for initial examination. That holding should also govern when such federal questions are raised in diversity cases. As shown in part III B, *supra*, federal law provides the substantive rule of decision as to federal questions raised in diversity cases.

In this case, however, Iowa Mutual does not question the jurisdiction of the Blackfeet Tribe over the claim raised. Iowa Mutual concedes that the State of Montana would not have jurisdiction over its claim because such jurisdiction would intrude upon tribal rights of self-government. *See, Petitioner's Brief* at 5-7. As Iowa Mutual states: "what precludes Iowa Mutual from suing the LaPlantes and the Willman's in Montana courts is the latter's status as reservation Indians." *Id.* at 7.

Hence, assuming the infringement doctrine is held to limit federal diversity jurisdiction, Iowa Mutual concedes that that doctrine vests exclusive jurisdiction in the Blackfeet tribal court over its claim. The rule in *National Farmers Union* therefore need not be applied, and the federal court should simply dismiss this case for lack of jurisdiction.

V. THE EXERCISE OF DIVERSITY JURISDICTION MAY BE BARRED BY THE PREEMPTION DOCTRINE, EVEN THOUGH THE TRIBE DOES NOT EXERCISE JURISDICTION OVER THE CLAIM

The Ninth Circuit, in its opinion in this case, reaffirmed the rule adopted in its earlier decision *R. J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 983-984 (9th Cir. 1983), that federal courts in diversity cases, have jurisdiction over claims which federal law vests exclusively in an Indian tribe, if there is no tribal forum for such claims.[9] The Ninth Circuit reasoned that in these instances, there is no interference with tribal rights of self-government. *Id.* This position is unsound because it fails to consider that state jurisdiction and federal diversity jurisdiction over reservation-based claims against tribal members is delimited not only by the infringement doctrine, but by the preemption doctrine as well. This Court has repeatedly emphasized that

> the assertion of state authority over tribal reservations remains subject to "two independent but related barriers." [Citation omitted.]
>
> First, a particular exercise of state authority may be foreclosed because it would undermine "the right of reservation Indians to make their own laws and be ruled by them." [Citation omitted.]

---

[9]This position is dictum in the opinion. However, amici are concerned that an affirmance by this Court of the Ninth Circuit's decision may be broadly construed to affirm the position that lack of a tribal forum permits federal courts to assert diversity jurisdiction over claims otherwise within tribal jurisdiction. Hence, amici present this argument to show the Court the unsoundness of this position. Based upon this showing, amici urge this Court, in affirming the Ninth Circuit's decision, expressly to disapprove the aforestated position.

> Second, state authority may be preempted by incompatible federal law.

Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138, 148 (1984.)

The decisions of this Court have conclusively established that tribal jurisdiction over reservation-based claims by non-Indians against Indians is exclusive under both the infringement and the preemption doctrine. *See, e.g., Williams v. Lee,* 358 U.S. 217, 221-223 (1959); *Kennerly v. District Court of Montana,* 400 U.S. 423, 426-428 (1971); *Three Affiliated Tribes v. Wold Engineering,* 467 U.S. 138, 148 (1984); *Three Affiliated Tribes v. Wold Engineering,* 476 U.S. —, 90 L.Ed.2d 881, 887 (1986).

Under the infringement test, the question for state courts and federal courts in diversity cases is whether the exercise of jurisdiction over reservation-based claims by non-Indians against Indians will interfere with tribal self-government. *McClanahan v. Arizona Tax Commission,* 411 U.S. 164, 179 (1973). And under the preemption test, the question is whether the claim "is totally within the sphere which the relevant treaty and statutes leave . . . for the Indians themselves." *McClanahan* at 179-180. State courts and federal courts in diversity cases must apply both tests in determining whether they may exercise jurisdiction over claims which are within a tribe's jurisdiction. It is possible that the exercise of state or federal jurisdiction over a claim will not contravene the infringement doctrine, but will contravene the preemption doctrine.

The controlling case is *Kennerly v. District Court of Montana,* 400 U.S. 423 (1971). In *Kennerly,* this Court held that Montana was barred from exercising jurisdiction over

a claim by a non-Indian against a Blackfeet tribal member which arose on the reservation, even though the Blackfeet Tribe legislatively authorized Montana to exercise concurrent jurisdiction over such claims. The Court held that Montana could acquire such jurisdiction only by compliance with the procedure set forth in Pub.L. 280, 25 U.S.C. §§ 1321-26. *Kennerly,* 400 U.S. at 427.

A fortiori, a state must also be prohibited from exercising exclusive jurisdiction over such claims, absent compliance with Pub.L. 280, when the tribe has legislatively determined not to exercise jurisdiction over such claims and has not expressly consented to state jurisdiction.

Likewise, in *McClanahan,* this Court expressly held that where federal law reserves exclusive jurisdiction in a tribe, a state may not exercise jurisdiction over claims subject to exclusive tribal jurisdiction even though tribal self-government will not be infringed. *McClanahan* held that an Arizona income tax could not lawfully be applied to income of Navajo Indians and their property on the Navajo reservation where the state had not acquired jurisdiction to tax on-reservation income and property by complying with Pub.L. 280, even though the Tribe itself did not tax such income. The reservation activity sought to be taxed by Arizona was found to be

> totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves. Appellee cites us to no cases holding that this legislation may be ignored simply because tribal self-government has not been infringed.

McClanahan, 441 U.S. at 179-180. The Court relied on its previous decision in *Kennerly* for the principle that non-infringement of tribal self-government is an insufficient

basis to overcome federal law reserving exclusive tribal jurisdiction over claims.

The principle established by *Kennerly* and *McClanahan* is soundly based in the congressional policy of encouraging tribal self-government. This policy basis is well-stated in *Enrique v. Superior Court,* 115 Ariz. 342, 565 P.2d 522 (Ct. App. 1977) in which the state court declined to take jurisdiction over a reservation-based tort claim by a non-Indian against an Indian, even though there was no showing that a tribal forum existed:

> [The] right of self-government includes the right to decide what conduct on the reservation will subject the Indians living there to civil liability in the Tribal court. The fact that the record here does not disclose whether the Tribal court does in fact provide a forum for the recovery for personal injuries is of no moment since assumption of jurisdiction by the state court would be, in effect, a declaration by a state court that such conduct is tortious, a declaration that only the . . . Tribe can make.

Id. at 523. *See, also,* F. Cohen, *Handbook of Federal Indian Law* 351 (1982) ("A tribe's legislative jurisdiction over its own people and within its own territory must include the right not to legislate at all in an area, if self-government is to be meaningful.")

Thus, amici submit that the rule adopted by the Ninth Circuit in *R. J. Williams,* and reaffirmed in this case, is directly contrary to this Court's decision in *Kennerly* and *McClanahan,* because it fails to test the propriety of diversity jurisdiction by the preemption doctrine as well as by the infringement doctrine. This failure effectively transforms the infringement doctrine into a tool for the diminishment of jurisdiction reserved to tribes by federal

treaties and statutes. Such a result is directly contrary to this Court's consistent view of the infringement doctrine as one of two independent "bars" to the assertion of state authority over tribal reservations. *See, Three Affiliated Tribes v. Wold Engineering,* 467 U.S. at 148.[10]

In this case, the Blackfeet tribal court, at the trial level, has now ruled that tribal law empowers that court to adjudicate Iowa Mutual's claim in this case of non-liability under an insurance contract.[11] The memorandum and order of the Blackfeet tribal court setting forth this ruling is reproduced in the parties' Joint Appendix at 33-44. Based upon this tribal decision, under the infringement doctrine, the Blackfeet tribal court has exclusive

---

[10]While the infringement doctrine may be applied as the threshold test for exclusive tribal jurisdiction, see Fisher v. District Court, 424 U.S. 382, 386 (1976), its most appropriate application is in those cases in which the tribe and the state have concurrent jurisdiction. A typical example of such a case is a reservation-based claim by a tribal member against a non-Indian. In Three Affiliated Tribes v. Wold Engineering, 476 U.S. —, 90 L.Ed.2d 881 (1986) (Wold II), the Court ruled that North Dakota had jurisdiction over such a claim "for which there is no other forum." 90 L.Ed.2d at 889. This decision was based upon the Court's reasoning in Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138 (1984) (Wold I), that the exercise of state jurisdiction over the claim was "compatible with tribal autonomy when . . . the suit is brought by the tribe itself and the tribal court lacked jurisdiction over the claim at the time the suit was instituted." *Id.* at 122.

[11]Generally, an insurance company presents a claim of non-liability through a declaratory judgment action against the insured. *See, e.g., 7 Williston on Contracts* § 914 at 423-24 (1963). However, the tribal court apparently allowed this claim to be presented by the company as a defense in the original action brought against the Wellmans and Iowa Mutual Insurance Company as the Wellman's insurer. In either instance, the claim is clearly classifiable as a claim against an Indian defendant.

jurisdiction over petitioner's claim and such claim cannot be adjudicated on its merits in this diversity action.

CONCLUSION

For all of the above reasons, the decision of the Ninth Circuit that federal diversity jurisdiction is delimited by the infringement doctrine announced in *Williams v. Lee* should be affirmed.

Respectfully submitted,
YVONNE T. KNIGHT
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760
Counsel of Record for all AMICI

CLAUDEEN BATES ARTHUR
AND BRUCE R. GREENE
Navajo Nation Department of Justice
P. O. Drawer 2010
Window Rock, AZ 86515
Counsel for the Navajo Nation Tribe of Indians

HAROLD A. MONTEAU
Tribal Legal Department
Confederated Salish and Kootenai Tribes of the Flathead Reservation
Box 258
Pablo, MT 59855
Counsel for Confederated Salish and Kootenai Tribes of the Flathead Reservation

DALE T. WHITE
FREDERICKS AND PELYGER
The Canyon Center
1881 9th Street, Suite 216
Boulder, CO 80302
Counsel for the Arapaho Tribe of the Wind River Reservation

W. RICHARD WEST, JR.
FRIED, FRANK, HARRIS, SHRIVER, AND JACOBSON
1001 Pennsylvania Ave., N.W.
Suite 800
Washington, DC 20004-2505
Counsel for the Shoshone Tribe of the Wind River Reservation

HOWARD FUNKE
Ft. Hall Business Council
P. O. Box 306
Ft. Hall, ID 83203
Counsel for the Shoshone-Bannock Tribes of the Fort Hall Reservation

September, 1986